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## Concepts, Categories, and Compliance in the Regulatory State

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## Article

# Concepts, Categories, and Compliance in the Regulatory State

Kristin E. Hickman and Claire A. Hill<sup>†</sup>

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*When someone calls a dog a cow and then seeks a subsidy provided by statute for cows, the obvious response is that this is not what the statute means. It may also happen that rich people who would not otherwise have cows buy them to gain cow subsidies. Here, when people say (as they do) that this is not what the statute means, they are in fact saying something quite different.*<sup>1</sup>

## INTRODUCTION

In an idealized (and naïve) view of the modern regulatory state, Congress enacts laws setting policies, resolving problems, and achieving goals that reflect a broad social consensus. Government agencies and courts work diligently to implement those laws and effectuate congressional purposes.<sup>2</sup> Citizens can readily determine what the law requires of them and generally follow those requirements; those who do not comply with the law are worthy of disapproval and punishment.

Of course, such a simple picture scarcely captures how most laws actually work. Congress adopts regulatory statutes that are complicated, ambiguous, and sometimes incomplete, and that delegate tremendous power to administrative agencies to resolve the ambiguities and fill in the gaps.<sup>3</sup> Agencies interp-

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1. Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U. CHI. L. REV. 859, 865 (1982).

2. This view of the relationship between congressional statutes and agency implementation thereof was in vogue about one hundred years ago but has long since been dismissed by scholars as unrealistic. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253 (2001) (describing the transmission belt theory of the administrative state and subsequent scholarly rejection of that theory); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1675 (1975) (same). The conception of the courts as faithful agents of Congress interpreting statutes to effectuate congressional purposes, also historically based, retains at least some currency. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 11–22 (2001) (documenting the conception of judges charged with interpreting legislation as faithful agents of Congress).

3. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 48 (1994) (describing statutory enactments as “often general, abstract, and theoretical”); *see also* MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 39–47 (2d ed. 1989) (contending that Congress has an incentive to adopt legislative programs and expand the federal bureaucracy to increase opportunities to help constituents resolve bureaucratic problems and thereby gain support for their own reelection efforts); Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT’L REV. L. & ECON. 217, 218–20 (1992) (listing several reasons why statutes “contain vexing gaps, gray areas, and opaque language,” including achieving legislative compromise, satisfying interest groups with competing interests, and accommodating changing preferences, as well as drafting difficulties and errors); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733,

ret, supplement, and expand statutory mandates through an extensive body of agency-generated regulations, rulings, adjudications, and informal actions which themselves are often complicated and ambiguous.<sup>4</sup> The actions required for regulated parties to comply with these laws are anything but straightforward.<sup>5</sup> Indeed, a regulated party may genuinely believe it is complying, only to have the government disagree.<sup>6</sup> Of course, all laws grapple with ambiguity and compliance issues.<sup>7</sup> Yet these problems seem to threaten the efficacy and legitimacy of regulatory regimes more fundamentally than other types of law, and of some regulatory regimes more than others.<sup>8</sup> Why might this be? This is the question that animates this Article.

Regulatory laws differ from other types of law in at least two important respects.<sup>9</sup> First, regulatory regimes are typically

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1741 (1995) (observing that legislators may reach agreement regarding “the meaning, authority, and soundness of a governing legal provision in the face of disagreements about much else”).

4. See, e.g., Stewart, *supra* note 2, at 1676–77 (noting that statutes which delegate broad discretionary powers to agencies run counter to the “transmission belt” theory of administrative law).

5. See Steven Kelman, *Enforcement of Occupational Safety and Health Regulations*, in ENFORCING REGULATION 97, 103 (Keith Hawkins & John M. Thomas eds., 1984) (“Perhaps the most unfortunate results come when legal requirements actually interfere with compliance because they make regulations so hard to understand.”).

6. See discussion *infra* note 21 (noting that even efforts to comply maximally with regulatory requirements may lead to interpretive disagreements and litigation between regulators and regulated parties).

7. See, e.g., Rodriguez, *supra* note 3, at 218 (observing that, even where statutory requirements are not particularly ambiguous, lawyers will still “manufacture” ambiguity in attempting to persuade courts to interpret statutes in their clients’ interests).

8. Of course, concepts such as efficacy and legitimacy are complex and nuanced, and the literature discussing them as regards the law is voluminous. See generally, e.g., JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 125–33, 259–66 (1978); JOHN H. SCHAAR, LEGITIMACY IN THE MODERN STATE 15–44 (1981); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 19–39 (2006); 1 MAX WEBER, ECONOMY AND SOCIETY 212–99 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978) (1922); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–95 (2005). For the purposes of this Article, intuitive and rather crude concepts suffice.

9. The distinction between regulatory laws and other laws is difficult to pinpoint precisely. Henry Friendly described regulatory law as encompassing: the entire range of action by government with respect to the citizen or by the citizen with respect to the government, except for those matters dealt with by the criminal law and those left to private civil litigation where the government’s only participation is in furnishing an impartial tribunal with the power of enforcement.

complicated and technical, both in their subject matter and in the programs they establish. Hence, they rely particularly heavily on terms of art, some of which have little or no meaning outside the law's requirements. Second, parties whose activities are covered by government regulation typically spend considerable time planning their actions in view of the law. Some amount of planning is generally necessary to achieve compliance with the law, and regulated parties who do not plan may be surprised to find their behavior at odds with legal requirements. Yet planning also inevitably runs up against ambiguity in statutory and regulatory meaning, and regulated parties may be able to choose between alternative plausible interpretations. Some regulated parties are uncomfortable with the risk that they will be pursued for noncompliance and thus choose to comply maximally with statutes and regulations to lessen that risk. Many others are more comfortable with risk and therefore comply only minimally. Among minimal compliers, some take aggressive positions while others are more cautious. Regulators react to minimal compliance by, among other things, fine-tuning the law. Regulated parties then adjust their behavior, but again not necessarily in ways that regulators expect or want. We argue that, under certain circumstances, this repeated pushing and pulling at the boundaries of statutory and regulatory meaning may lead to a regime whose requirements and prohibitions can only be understood by detailed reference to its history.

Law is, of course, always a product of its history. Agencies and courts seeking to interpret statutory meaning routinely refer to the legislative history documenting the circumstances

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Henry J. Friendly, *New Trends in Administrative Law*, 6 MD. B.J., Apr. 1974, at 9, 9. Focusing more specifically on compliance, as we do here, Cento Veljanovski observes that nonregulatory criminal offenses are "positive act[s]" and "discrete event[s]" that "redistribute and destroy wealth," while regulatory offenses tend to be "byproducts of the pursuit of some otherwise socially beneficial activity" that involve a "failure to act" and "a continuing state of affairs" and that "occur within an organization where the responsibilities for compliance are often diffused." Cento G. Veljanovski, *The Economics of Regulatory Enforcement*, in ENFORCING REGULATION, *supra* note 5, at 171, 179. One can readily imagine scenarios that are clearly regulatory yet do not quite satisfy either of these conceptions. There may also be laws that seem to fall within these broad descriptions but that one nevertheless resists labeling as regulatory when comparing them, for example, to the laws governing classic regulated industries like utilities and railroads. Nevertheless, together these definitions reflect common intuitions about the scope and nature of regulatory law, and we regard them as both close enough and consistent with the features of regulatory law that we consider particularly salient for purposes of this Article.

prompting legislative action and the compromises of the legislative process. Agency and judicial precedent also play a prominent role in understanding the law's requirements and scope and guiding regulated party behavior. In referencing a regulatory regime's history, however, we reach more broadly than just legislative history and precedent to encompass the full range of inputs that drive the law's trajectory, including actions and reactions by legislators, regulators, courts, and regulated parties as the law is applied and acted upon, as well as political and other like forces influencing the law and its coverage.

For some regimes, history matters both more and differently than for others. In some instances, the requirements and scope of a regulatory regime's coverage are sufficiently attenuated from statutory text and purpose that they can only be explained or understood by reference to history; the regime is fundamentally historically contingent. At its (perhaps caricatured) extreme, such a regime is one in which regulated parties expend significant efforts attempting only the most minimal compliance, to the point that compliance is perceived as optional and, to some nontrivial extent, is indeed so. Some set of activities the regime manages to sanction or constrain is perceived as, and to some nontrivial extent is, unanchored to any reasonable conception of the regime's purpose. Indeed, under such a regime, activities that might seem to warrant the same treatment are sometimes treated differently, and activities that might seem to warrant different treatment are treated the same. This happens frequently enough that the regime's coverage is difficult to justify in any principled manner, compromising its efficacy and legitimacy.

What does a regime that is so importantly shaped by its history (or, as we will sometimes call it, trajectory) look like, and how does a regime get to that state? In articulating its requirements and prohibitions, law often starts with a prototype, a paradigmatic case of what it wants to regulate. There is a prohibition on doing *X*, and anything sufficiently like *X*, and the imposition of consequence *Y* for noncompliance. Ideally, where it is unclear whether particular actions are similar enough to *X* to warrant sanction, the interactions between regulated parties, regulators, and other interested parties—pushing, pulling, and testing the parameters of regulatory requirements—would not only resolve those cases but also refine and elaborate the regime's goals and means for achieving them. Sometimes, however, the trajectory goes awry, and the similar-

ity assessment yields results that depart appreciably from any reasonable conception of the regime's text or purpose. A subsidy that applies to cows, for example, is successfully extended to some dogs, and maybe sheep, pigs, and chickens as well.

Compounding the difficulty further, law often emphasizes certainty and encourages planning by providing detailed roadmaps of necessary and sufficient conditions for achieving particular legal consequences. Turning again to the cow subsidy example, perhaps the statute awards the subsidy based upon the number of cows owned as of the end of the owner's fiscal year, without further elaboration or qualification. In theory, two parties with different fiscal years could transfer ownership of the cow back and forth annually, so that each owns the cow as of the applicable measurement date. In other words, given rules that are susceptible to formalistic interpretation, a single cow may yield subsidies for more than one owner.

This phenomenon is well known. In the debate over rules versus standards, scholars appropriately criticize rules for allowing spirit-violative behavior that uses technical, formalistic readings to produce a result other than, and perhaps contrary to, what Congress or the implementing agency intended.<sup>10</sup> Law typically seeks to avoid the potentially absurd extremes of rules or formalistic interpretations of statutory text through the use of ex post standards, which often take the form of what we call goal-derived categories. Yet, given the role of precedent and predictability, at a certain point, we may just be stuck with many non-cow cows or with multiple subsidies of a single cow. In a regime that relies strongly on its trajectory in articulating its requirements, many rules will permit considerable spirit-violative behavior, the standards ostensibly available to address such behavior will find themselves foreclosed, and the overall coverage of the regime will reflect its history far better than its substance and purpose.

Our goal with this Article is a preliminary one: to describe a basic theory by which minimalist compliance and regulator reactions thereto may lead to a regime that is far better explained by its trajectory than by statutory or regulatory text or purpose. We thus intend this Article to serve as a foundation for future work in which we will elaborate the theory in more detail and apply it comparatively across a broad range of regulatory regimes such as tax, campaign finance, antitrust, envi-

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10. See generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

ronmental law, and securities law. Our account has potentially useful implications, perhaps helping to inform policy responses to difficulties that regulatory regimes typically encounter. In this regard, we note that in many areas, people's reasons for complying with law can scarcely be purely instrumental. The law simply does not have the resources to pursue all plausible cases of less-than-full compliance. If people do not think a regime is legitimate, evidence suggests they are far less likely to comply.<sup>11</sup>

In the course of describing our theory, we often present the federal income tax laws as a polar case of a regulatory regime that notoriously struggles with both efficacy and legitimacy. Our ultimate goal is to identify factors that might adversely affect *any* regulatory regime's efficacy and legitimacy.<sup>12</sup> That being said, we note that there is some debate within the tax community over whether tax is an exceptional case, such that legal doctrines, principles, or observations common among other regulatory regimes simply cannot and should not apply similarly in the tax context.<sup>13</sup> One of us has publicly rejected argu-

11. See ERICH KIRCHLER, *THE ECONOMIC PSYCHOLOGY OF TAX BEHAVIOUR* 67 (2007) ("If a taxpayer believes that non-compliance is widespread and a socially accepted behaviour, then this taxpayer is more likely not to comply."); TYLER, *supra* note 8, at 22–27 (linking compliance with perceptions of legitimacy and observing that "in democratic societies the legal system cannot function if it can influence people only by manipulating rewards and costs"); Claire A. Hill, *What Cognitive Psychologists Should Find Interesting About Tax*, 17 *PSYCHONOMICS BULL. & REV.* (forthcoming Apr. 2010) (discussing the psychology literature on noncompliance in tax).

12. We make no normative claim that it is always bad to "harm" a regulatory regime. We acknowledge the argument that government ought to be challenged, and that the regulatory envelope should be pushed, as a needed counterweight to the government's power. The phenomenon we discuss in this Article concerns potential threats to regulatory regimes that go beyond such arguably healthy challenges.

13. Compare, e.g., Paul Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up To Be Tax Lawyers*, 13 *VA. TAX REV.* 517, 531 (1994) (documenting and rejecting justifications for tax exceptionalism), Karla W. Simon, *Constitutional Implications of the Tax Legislative Process*, 10 *AM. J. TAX POL'Y* 235, 237–44 (1992) (observing substantial differences between tax and other areas of regulatory law yet rejecting tax exceptionalism), and Lawrence Zeleznak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 *N.C. L. REV.* 623, 630 (1986) (rejecting "treating interpretation of the [Internal Revenue] Code as a subject distinct from the interpretation of any other statute"), with DANIEL SHAVIRO, *WHEN RULES CHANGE* 86–87 (2000) (contending that the tax legislative process is unusually dominated by interest groups and reflects other unique pathologies that justify special interventions), Bradford L. Ferguson, Frederic W. Hickman & Donald C. Lubick, *Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 *TAXES* 804, 823 (1989) (contending that the uniqueness of



ments favoring tax exceptionalism.<sup>14</sup> We assume for now that tax and other regulatory regimes differ in degree rather than in kind, but accept as possible that further development of our theory may establish the tax regime as meaningfully different in kind, such that our theory applies differently for tax than for other regimes.

We also add two important caveats. One is that we make no claim as to other factors that might undermine a regime's efficacy and legitimacy, such as selective enforcement, or pervasive noncompliance coupled with apparent regulator acquiescence through nonenforcement. The other is that we largely leave aside issues of enforcement beyond the efforts of regulators to target regulated parties' minimal compliance through regulations, case-by-case enforcement and adjudication, or both.

Toward these ends, in Part I, we offer general observations concerning regulatory compliance. We consider how parties seek to comply with regulatory statutes, and how aggressive or cautious they aim to be in the face of ambiguous statutory meaning. We also discuss the extent to which forces other than government enforcement efforts might constrain minimalist compliance. In this regard, we examine the relationship between regulated parties' compliance efforts and the norms of their relational community.

In Part II, we reflect upon how regulatory regimes attempt to achieve their purposes. We note particularly the reliance of regulatory regimes on terms of art, and the sources of those terms. We discuss the role of statutory purpose in defining and contextualizing those terms. We also consider the extent to which regulatory regimes may be particularly dependent on history in their evolution and development, delineating particularly our polar case, tax, as a regime that is strongly and fundamentally contingent upon its history and trajectory.

In Part III, we show how laws reflect the extent of a regime's fundamental historical contingency. Laws attach consequences to particular categories of behavior. Laws must estab-

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the tax legislative process means that tax legislative history "should be considered as having virtual parity with the statute itself"), and Mary L. Heen, *Plain Meaning, the Tax Code, and Doctrinal Incoherence*, 48 HASTINGS L.J. 771, 814–19 (1997) (suggesting that the Internal Revenue Code is unique in its complexity, its constantly changing nature, and its insulation from the influence of special interest groups).

14. See generally Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006).

lish ways of determining category membership and, implicitly, must justify why category members are being treated a particular way and in the same way. We demonstrate how the ways of determining category membership can create categories that cannot be fully justified in a principled manner, and how they do so in the case of regimes that are strongly historically contingent.

In Part IV, we present a stylized contrast between a successful, less trajectory-dependent regime, where the categories complement one another and produce significant coherence, and a less successful, more historically contingent regime, where the categories are in tension with one another and the regime suffers from considerable incoherence.

### I. THOUGHTS ON REGULATORY COMPLIANCE

When Congress and administrative agencies draft statutes and regulations, they surely anticipate that many regulated parties will have incentives not to comply. If enough regulated parties simply flout a regulatory regime's mandates and are not effectively called to account, so that compliance appears to be optional, then the regime's efficacy and legitimacy will be compromised. But wholesale intentional noncompliance is rare; most regulated parties will at least try to satisfy regulatory requirements. That said, compliance is far more complicated than a simple binary choice to comply or not. Given regulatory requirements that are frequently ambiguous or unclear, regulated parties may face several more-or-less reasonable alternatives. In such instances, they often will not make the choices that regulators prefer and instead will choose to comply more minimally.

#### A. DEGREES OF COMPLIANCE

An extensive scholarly literature exists concerning the compliance problems of complex regulatory regimes. Much of this literature revolves around two compliance models—the deterrence or coercive model and the accommodation or cooperative model.<sup>15</sup> These two models in turn reflect different con-

15. See, e.g., Timothy F. Malloy, *Regulation, Compliance, and the Firm*, 76 TEMP. L. REV. 451, 453–55 (2003) (recognizing “two visions” of regulated parties within the compliance literature); see also Robert L. Glicksman & Dietrich H. Earnhart, *Depiction of the Regulator-Regulated Entity Relationship in the Chemical Industry: Deterrence-Based vs. Cooperative Enforcement*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 603, 611–44 (2007) (describing both models and studying them empirically).

ceptions of noncompliant actors. The deterrence model contemplates regulated parties as rational actors motivated by self-interest determined by weighing the benefits and costs of non-compliance—an equation that can be altered by expanding government enforcement efforts and increasing penalties for violations.<sup>16</sup> The second model assumes that most regulated parties want to comply with the law and will respond more positively to persuasion, education, and assistance than to penalties.<sup>17</sup> Of course, regulated parties are not a homogenous group, and the assumptions driving both models accurately capture some segment of the relevant population; indeed, it seems likely that many if not most regulated parties respond to both models, depending upon the circumstances.<sup>18</sup> For expository ease, we presume that regulated parties make cost-benefit determinations based on their assessments of costs and benefits broadly construed, including not only monetary savings and the possibility of legal sanctions but also extra-legal rewards and sanctions relating to reputation, personal feelings of virtue and law-abidingness, and other factors.<sup>19</sup>

Regulated parties sometimes do just flout regulatory requirements. They may have different reasons for disobeying the law, whether calculated self-interest, principled disagreement,

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16. See, e.g., Malloy, *supra* note 15, at 453 (describing the firm under the deterrence model as “a rational profit-maximizer, obeying the law only when it is in the firm’s best economic interest to do so”); see also John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 389–407 (1981) (analyzing deterrence methods by reference to relative costs and benefits).

17. See, e.g., TYLER, *supra* note 8, at 3–4 (contending that people are naturally inclined to comply with laws they perceive as legitimate); see also Allison F. Gardner, *Beyond Compliance: Regulatory Incentives to Implement Environmental Management Systems*, 11 N.Y.U. ENVTL. L.J. 662, 664–67 (2003) (discussing one such cooperative program for accomplishing statutory goals and enforcing regulatory requirements); Christine Parker, *Compliance Professionalism and Regulatory Community: The Australian Trade Practices Regime*, 26 J.L. & SOC’Y 215, 216 (1999) (observing that “self-regulatory and compliance-oriented models of corporate regulation have been adopted in areas as varied as occupational health and safety, equal employment opportunity, environmental regulation, consumer dispute resolution, securities regulation, and antitrust”).

18. See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* 158–62 (1992) (contending that regulation should incorporate both deterrence-oriented and cooperative methods in response to varying regulated party motives and circumstances); Malloy, *supra* note 15, at 456 (suggesting that the deterrence and cooperative models are not mutually exclusive).

19. See Claire A. Hill, *The Law and Economics of Identity*, 32 QUEEN’S L.J. 389, 406–21 (2007) (discussing identity payoffs for particular identities such as law-abidingness and civic mindedness).

or simple ignorance.<sup>20</sup> There is no question, however, that these parties lack any remotely colorable legal argument to justify their noncompliance. At the other extreme, sometimes regulated parties will attempt to comply maximally with the law, rejecting anything but the greatest possible adherence to regulatory requirements.<sup>21</sup> These maximal compliers may have different reasons for pursuing a high level of compliance, whether for the larger public good, the simple desire to avoid confrontation with regulators, or perhaps even because they perceive their interests to be aligned with those of the regulators.<sup>22</sup> Neither those who flout the law nor those who comply maximally hold much interest for our account. If positions taken by the flouters became more mainstream, such that regulated parties begin to perceive compliance with regime requirements as op-

20. Robert Kagan and John Scholz similarly divide firms that fail to comply with regulatory requirements into three subgroups: amoral calculators who conclude that the benefits of disobedience outweigh the risk and cost of getting caught, political citizens who generally want to comply with the law but disobey out of principled disagreement with what they see as arbitrary or unreasonable legal requirements, and incompetent organizations that simply fail to adequately educate and supervise employees. See Robert A. Kagan & John T. Scholz, *The "Criminology of the Corporation" and Regulatory Enforcement Strategies*, in ENFORCING REGULATION, *supra* note 5, at 67, 67–68.

21. See, e.g., David A. Weisbach, *Ten Truths About Tax Shelters*, 55 TAX L. REV. 215, 221–23 (2002) (broadly criticizing tax planning). We do not contend normatively that maximal compliance is desirable. In any event, what counts as maximal compliance may be difficult to characterize. One possible definition could equate maximal compliance with what the regulating agency would want, but this formulation unduly elevates the agency's desires, which may not be coextensive with some principled views of what the regime is and should be doing. In some instances, a regulated party may truly believe that it is acting in accordance with statutory requirements, and that the relevant agency's alternative interpretation of the statute is mistaken, only to have a court side with the agency. See *id.* at 224 (recognizing that, even in a system with no planning, litigation between the regulator and regulated parties will nevertheless occur). All this being said, for expository ease, we will generally treat maximal compliance as being what a regulator, or perhaps an idealized regulator, would want.

22. See, e.g., Neil Gunningham, Robert A. Kagan & Dorothy Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307 (2004) [hereinafter Gunningham et al., *Social License and Environmental Protection*] (examining reasons for over-compliance with legal requirements); see also Dorothy Thornton, Robert A. Kagan & Neil Gunningham, *When Social Norms and Pressures Are Not Enough: Environmental Performance in the Trucking Industry*, 43 LAW & SOC'Y REV. 405, 406 (2009) (noting that "many regulated firms routinely go 'beyond compliance,' taking nonlegally required actions that advance regulatory goals," for example by building in margins of error in complying with regulatory requirements); discussion *infra* Part I.B (discussing potential alignments in the interests of regulators and regulated parties).

tional, a regulatory regime's efficacy and legitimacy might be threatened.<sup>23</sup> As it is, flouters are largely dismissed as scofflaws and cranks, their overall impact on efficacy and legitimacy is typically small, and government enforcement efforts against them may even be largely expressive.<sup>24</sup> Maximal compliance, not surprisingly, does not hurt and may even further efficacy and legitimacy, for example by reinforcing a norm of compliance.<sup>25</sup>

Our principal concern is with regulated parties who fall between these two extremes, which we will label for convenience minimal compliers.<sup>26</sup> These parties operate in the gray areas of the law, but they do so in vastly different ways. Some are aggressive planners. These parties comply at least facially with the law, but often do no more than that.<sup>27</sup> They file their tax

23. See KIRCHLER, *supra* note 11, at 67 (making a similar point).

24. See, e.g., *id.*, at 21–27 (documenting studies showing that most taxpayers do not evade the tax laws outright); Dave Rifkin, *A Primer on the "Tax Gap" and Methodologies for Reducing It*, 27 QUINNIPIAC L. REV. 375, 377, 406–07 (2009) (observing that nonfiling of tax returns represents a mere eight percent of federal tax code noncompliance and characterizing aggressive IRS pursuit of tax protesters instead as a "battle over public perception" undertaken primarily for its deterrent effect).

25. See KIRCHLER, *supra* note 11, at 70 (concluding that, "if a taxpayer believes that tax compliance in her or his country is perceived as a virtue and the majority of people comply and condemn evasion, than [sic] she or he is more likely to comply"); Hill, *supra* note 11 (discussing same).

26. Other scholars, particularly in the tax context, have distinguished regulated parties who take positions the legality of which is unclear from those whose actions are clearly illegal. See, e.g., KIRCHLER, *supra* note 11, at 21 (recognizing degrees of compliance and observing that "non-compliance does not necessarily imply the violation of law"); Michelle Hanlon & Joel Slemrod, *What Does Tax Aggressiveness Signal? Evidence from Stock Price Reactions to News About Tax Shelter Involvement*, 93 J. PUB. ECON. 126, 126–27 (2009) (distinguishing "tax aggressiveness" from noncompliance); Rifkin, *supra* note 24, at 378–79 (attributing some portion of "noncompliance" with the federal income tax laws to taxpayers who utilize legal, though perhaps unintended, loopholes or adopt legal tax positions and strategies); Michael Wenzel, *The Impact of Outcome Orientation and Justice Concerns on Tax Compliance: The Role of Taxpayers' Identity*, 87 J. APPLIED PSYCHOL. 529, 630 (2002) (distinguishing clearly illegal acts of tax evasion from "borderline cases" involving certain tax minimization strategies).

27. Throughout this Article, we talk about facial compliance, or compliance with the letter or fact of the law, that violates the law's purpose or spirit. Although we discuss at some length the existence and role of statutory purpose in regulatory regimes, see *infra* Part II.B, we also recognize that this concept is impossible to define rigorously. Nevertheless, the great weight of common sense and intuition, as well as the frequent references to the purpose or spirit of the law in the scholarly literature, suggest that the concept has enough content to be useful and used. Consider in this regard the following contracts example: An employment agency has a provision in its agreement

returns and permit applications, submit to required inspections, and otherwise engage the regulatory regimes that govern their actions. They also engage reputable lawyers to help them calculate their compliance with great care, discerning in advance the gray areas of statutory and regulatory text and planning their behavior to conform colorably to the law. In short, this group seeks to comply in the most minimal way possible, acting only so as to preserve a facially plausible argument that they have formally complied with the statute and related regulations, irrespective of the law's spirit. For example, tax shelter participants file their tax returns and pay the taxes shown as due, but employ aggressive interpretations of the tax laws to report and pay tax liabilities that are dramatically lower than would be the case with more maximal compliance. Taxpayers in this category may enter into transactions that, but for the tax effects, they would never contemplate.<sup>28</sup>

Other minimal compliers are more moderate in their planning. They are more cautious and less inclined to "push the envelope" of what the law will allow. Yet, members of this group may be just as inclined to choose a close or narrow reading of statutory and regulatory text and legislative history that reduces their compliance costs over an equally reasonable (or perhaps even better-supported) but more expensive alternative.<sup>29</sup> Some may seek a greater margin of safety by taking po-

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with a firm to the effect that if the firm hires anyone whose name the employment agency provides, the firm owes the agency a commission. The employment agency then gives the firm a telephone directory for the city in which they are both located. Even if other facts prove less susceptible to arguments over the contract's purpose or spirit, we maintain that it would be hard not to characterize that particular action as spirit-violative.

28. The economic substance doctrine, a common law anti-abuse standard that the courts often apply to invalidate transactions for federal income tax purposes, includes as one of its elements "whether the transaction has any practical economic effects other than the creation of income tax losses." *ACM P'ship v. Comm'r*, 157 F.3d 231, 248 (3d Cir. 1998) (quoting *Jacobson v. Comm'r*, 915 F.2d 832, 837 (2d Cir. 1990)); Joseph Bankman, *The Economic Substance Doctrine*, 74 S. CAL. L. REV. 5, 9–10 (2000) (recognizing the need for nontax economic consequences as an element of the economic substance doctrine).

29. Consistent with the literature on regulatory compliance generally, in speaking of the cost of compliance, we mean amounts expended by a regulated party to satisfy regulatory requirements in addition to amounts paid to professionals to explain legal requirements and develop compliance strategies. See, e.g., C. Steven Bradford, *Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation*, 8 J. SMALL & EMERGING BUS. L. 1, 7–11 (2004) (describing different types of regulatory compliance costs as part of study); Toni Makkai & John Braithwaite, *The Limits of the Economic Analysis of Regulation: An Empirical Case and a Case for Empiricism*, 15 LAW & POLY

sitions that are quite close to those that have passed muster before.<sup>30</sup> Unlike aggressive planners, moderate planners will not seek out elaborate tax shelters or other eyebrow-raising techniques. They will, however, go as far as their comfort level with risk allows them in using cost-reduction strategies.<sup>31</sup>

Whether more aggressive or more cautious, minimal compliers by definition will follow a regulatory regime less or differently than regulators would like.<sup>32</sup> As we discuss further below, regulators will consequently react to minimal compliance by pursuing enforcement actions, adopting or amending regulations, seeking statutory changes, or some combination thereof. Regulated parties will then respond by adjusting their efforts, again triggering regulatory reaction. Of course, in some sense,

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271, 271–73 (1993) (defining compliance costs in these terms for purposes of study).

30. We have already recognized some maximal compliers may in good faith adopt interpretations that they truly believe comply with legal requirements but that regulators and courts later judge noncompliant. *Cf.* Weisbach, *supra* note 21, at 224. By contrast, our description of minimal compliers here encompasses those who hew quite closely to existing legal pronouncements. Certainly these two groups overlap. One may distinguish them, however, by assuming that the former are unaware that they are operating in the gray area of the law while the latter are more cognizant of the uncertainty of their position.

31. The recent case of *Nelson v. Comm'r*, 130 T.C. 70 (2008), *aff'd*, 568 F.3d 662 (8th Cir. 2009), offers an interesting example from the tax context. Farmers who ordinarily reported their income from sugar beet production over two tax years consistent with statutory requirements lost their sugar beet crop to unusually wet weather, collected insurance proceeds in Year 1, and interpreted ambiguous statutory language as allowing them to defer 100% of the insurance proceeds to Year 2. *See id.* at 71–73. Reviewing courts concurred with the IRS that the taxpayers should have recognized the insurance proceeds in Year 1, but agreed with the taxpayers that the statute was ambiguous and that they should not be otherwise penalized for taking an alternative position in good faith on their tax return. *See Nelson*, 568 F.3d at 665–66; *see also Nelson*, 130 T.C. at 78–79. Although the *Nelson* example concerns tax law compliance, examples of this phenomenon are legion throughout the regulatory sphere. One particularly colorful example involved an importer of coffee that had a shipment of beans damaged by water during a hurricane and sought to salvage as many beans as possible by drying the beans, skimming off those that had molded, and rebagging the remainder for sale abroad if not in the United States; more than four years of litigation ensued over Federal Food, Drug, and Cosmetic Act requirements and the importer's compliance therewith. *See United States v. 484 Bags, More or Less*, 297 F. Supp. 672, 673 (E.D. La. 1969), *vacated*, *United States v. 484 Bags, More or Less*, 423 F.2d 839 (5th Cir. 1970); *Carl Borchsenius Co. v. Gardner*, 282 F. Supp. 396, 400–05 (E.D. La. 1968).

32. In this Article, we define maximal compliance as striving for the greatest possible adherence to regulatory requirements. *See discussion supra* note 21.

all law proceeds in this way. Common law is particularly amenable to cumulation of this type, as precedents necessarily incorporate the trajectory of issues that courts have resolved and as conduct adjusts to take into account previous cases, subsequently facing its own court challenges. As we will contend, while this interaction between regulators and the regulated may sometimes yield better, more comprehensive, and more nuanced law, at other times it leads to incoherence.

#### B. PUSH AND PULL

Complying minimally certainly involves more risk and may involve more effort than complying maximally.<sup>33</sup> When will it be worthwhile to take extra risk or expend additional effort? Some obvious factors include how much of a payoff there is for minimal compliance, how many other constraints there are that might limit use of techniques potentially available, and the relevant norms in the industry.

Regulated parties that might on some metric benefit from complying more minimally and have plausible minimal compliance strategies available to them sometimes choose instead to comply more maximally. Social norms and reputational concerns may, by themselves or in combination with other factors, outweigh the direct economic costs of compliance.<sup>34</sup> Moreover, in some regimes, the interests of regulators and regulated parties may overlap more directly. Companies may, for example, be motivated to comply maximally with disclosure requirements under the federal securities laws to avoid third-party lawsuits; plaintiffs' lawyers are notoriously quick to bring a suit where they think they can show faulty disclosure. A company that is less than forthcoming in its disclosure may also be viewed unfavorably in the markets: third parties may infer that what a company does not forthrightly reveal must be negative. Moreover, the law articulates a standardized form such disclosures must take. Mandatory, standardized disclosures may simultaneously advance both regulator and regulated party interests by helping investors investigate and compare securities

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33. Of course, not complying at all involves the least effort and may be riskiest. Maximal compliance at least necessitates ascertaining what the law requires. As noted, however, neither total noncompliance nor maximal compliance is the focus of this Article. *See supra* text accompanying note 26.

34. *See, e.g.,* Gunningham et al., *Social License and Environmental Protection*, *supra* note 22, at 326–27 (documenting impact of reputational concerns on corporate compliance attitudes).



offerings and giving them confidence to participate in the securities markets.<sup>35</sup>

The proliferation of cooperative compliance programs further demonstrates the potential for commonality of interests. Consider, for example, the Environmental Protection Agency's (EPA) Project XL (so named for "eXcellence" and "Leadership"), in which the EPA allows regulated parties to propose and implement innovative methods of improving environmental performance—thereby serving as testing grounds for new ideas—in exchange for flexibility in satisfying regulatory requirements.<sup>36</sup> The Occupational Safety and Health Administration (OSHA) likewise has established a collection of cooperative and voluntary programs that, for example, exempt employers from routine inspections and allow them to claim "star" status in exchange for maintaining exemplary safety records and satisfying other program certification requirements.<sup>37</sup> "Star" status presumably helps a company's reputation and may help it compete with its peers; if its peers all become stars as well, then it presumably does not want to risk the reputational cost of not being a star.

Norms that discourage minimal compliance arise not only for regulated parties but also for their lawyers. In some fields, lawyers may tend to advise more maximal compliance. Consider, for example, the practice by corporate law firms of routinely sending memos to their clients reporting not only judicial holdings but also dicta and judicial pronouncements made in speeches and articles, and advising their clients to conform their behavior even to guidance that has no legal force.<sup>38</sup>

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35. See Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 680–707 (1984) (offering arguments concerning the rationale for mandatory, standardized disclosures).

36. See generally Dennis D. Hirsch, *Project XL and the Special Case: The EPA's Untold Success Story*, 26 COLUM. J. ENVTL. L. 219, 222–34 (2001) (describing Project XL and offering examples of XL projects).

37. See Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1105–08 (2005) (describing the Voluntary Protection Program and other OSHA programs).

38. Compare Claire Hill & Brett McDonnell, *Executive Compensation and the Optimal Penumbra of Delaware Corporate Law*, 4 VA. L. & BUS. REV. 333, 360–64 (2009) (discussing how corporate law firms give their clients cautious advice that encourages maximal compliance), with Richard Lavoie, *Deputizing the Gunslingers: Co-opting the Tax Bar into Dissuading Corporate Tax Shelters*, 21 VA. TAX REV. 43, 46 (2001) ("[Tax] attorneys often find such savings through the exploitation of obscure gaps in the statutory scheme, exploitations which are completely at odds with sound tax policy or the intent of the drafters."), and *infra* notes 54–56 and accompanying text. Of course, this is not to

Moreover, in some, and perhaps many, fields, regulated parties may anticipate being on different sides of a particular issue at different times. For instance, the same party might be both a patent holder today and a licensee tomorrow. For that matter, particularly in transactional fields, today's adversary may be tomorrow's partner. Such circumstances may constrain minimal compliance for two reasons. A party that anticipates being on the other side of an issue may not want to complicate its efforts to advance potentially useful arguments.<sup>39</sup> Less obviously, the regulated party may belong to a reputational community that would frown upon particularly legalistic or overly technical arguments.<sup>40</sup>

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say that all lawyers within a given field have the same level of caution; indeed, we would expect that firms might sort by reputation, where one firm of lawyers in a particular field is known to be more cautious and another is known to be more aggressive. Still, we think that it is fair to characterize the general ethos in some fields of law as more cautious than that of other fields.

39. An interesting issue arises as to the interests of law firms versus perhaps different interests of their clients. Some law firms have clients on both sides of an issue—for instance, hostile acquirers and companies defending against hostile acquirers, or bankruptcy debtors and bankruptcy creditors. To what extent might a law firm in that position be foreclosed from making arguments or taking positions in their clients' interests? To what extent might a law firm's behavior be affected by its role, status and history in the reputational community of its peer law firms? These questions are largely beyond the scope of this Article. That being said, James Freund offers a fascinating illustration of a dynamic among lawyers who are repeat players in the transactional world, in the form of a playlet of acquisition negotiations involving the characters of Sol Sagacity and Perry Prudent, respectively seller's and purchaser's outside counsel, who know one another from representing opposing clients in other deals. One interchange is as follows:

Sagacity: Come on, Perry . . . You know you'd ask for the same thing if you were in my shoes. In fact—I just remembered—you *did* ask for it in that Lorax-Grinch deal where you represented the seller!

Prudent: That's right, Sol—and you handed me the same ungracious little speech I just gave you. I've been lying in wait all these years.

JAMES C. FREUND, ANATOMY OF A MERGER 514 (1975).

40. See, e.g., Errol Meidinger, *Regulatory Culture: A Theoretical Outline*, 9 LAW & POL'Y 355, 363–72 (1987) (identifying and analyzing the cultural dynamics of regulatory communities); Parker, *supra* note 17, at 227–33 (considering the implications of regulatory community dynamics in the context of the Australian trade practices regime); see also Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1807–14 (1996) (recognizing similar phenomena in the context of commercial and other market transactions); Claire A. Hill, *Bargaining in the Shadow of the Lawsuit: A Social Norms Theory of Incomplete Contracts*, 34 DEL. J. CORP. L. 191, 211–13 (2009) (arguing that contracting parties known to exploit loopholes will find transacting more difficult and expensive because of the wariness of potential partners).

These constraints are, of course, limited. It is hard to imagine a regulatory regime where the regulated parties' interests align precisely with those of the regulators. Many, and perhaps most, regulated parties will engage in varying degrees of minimal compliance in the form of boundary pushing, and regulators will police those boundaries and pull regulated parties back toward the regulators' preferences. In the course of that push and pull, regulated parties may have little stake in the broader integrity of the underlying regime. Regulators may have more interest in maintaining coherence, but they also are subject to competing influences, such as political pressure and resource-allocation limitations. Press and public reaction to particular conduct may gain such salience that the agency must act, even if it would rather focus on other priorities. In the tax context, for example, both political pressure to maximize revenue collection<sup>41</sup> and judicial canons construing exclusions and deductions narrowly<sup>42</sup> may color how regulators interpret the law as envisioned by Congress. For that matter, regulators may choose to allow small instances of minimal compliance as a sort of pressure-release valve to discourage regulated parties from pushing the envelope in more novel ways or declining to comply outright.<sup>43</sup>

Some regulatory regimes may present instances where the interests of regulators and regulated parties are more or less intractably divergent. Tax may be a particularly extreme example. Even though Congress and the Treasury Department sometimes adopt taxpayer-friendly rules—i.e., rules written with administrability or public policy concerns rather than rev-

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41. See, e.g., Gary L. Rodgers, *The Commissioner "Does Not Acquiesce,"* 59 NEB. L. REV. 1001, 1024–25 (1980) (recognizing that budgetary pressures mean that the IRS is under pressure to interpret ambiguous statutes to maximize tax collections).

42. See, e.g., *INDOPCO, Inc. v. Comm'r*, 503 U.S. 79, 84 (1992) (“[T]his Court has noted the familiar rule that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer.” (footnote omitted)); *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 430 (1955) (counseling “liberal construction” to the “broad phraseology” in the Internal Revenue Code’s definition of gross income); Steve R. Johnson, *The Canon That Tax Penalties Should Be Strictly Construed*, 3 NEV. L.J. 495, 495–96 (2003) (summarizing judicial canons applicable in the tax context).

43. See, e.g., Philip A. Curry, Claire Hill & Francesco Parisi, *Creating Failures in the Market for Tax Planning*, 26 VA. TAX REV. 943, 944 (2007) (arguing that the government might leave open some known tax loopholes to discourage taxpayers from wasting resources in aggressively seeking more obscure or unknown tax loopholes).

enue-raising in mind<sup>44</sup>—the general ethos of tax administration emphasizes revenue collection.<sup>45</sup> As Joseph Isenbergh observed, “[t]he Treasury, naturally enough, regards the reduction of tax obligations as a ubiquitous bad thing. Because there are many different ways of engaging in transactions with roughly similar ends, some more heavily taxed than others, the world in Treasury’s view is a mosaic of bad things.”<sup>46</sup>

Meanwhile, taxpayers nearly always want to pay less tax, and the sorts of external constraints discussed above do not weigh strongly in favor of maximal tax compliance. Aside from the occasional whistleblower, third-party enforcement is non-existent.<sup>47</sup> Some comparatively weak constraints may exist. For example, evidence exists suggesting that people or companies judged to be aggressive in their attempts to minimize their tax liability suffer reputational costs, though such costs do not seem to be very large.<sup>48</sup> Indeed, some people, such as shareholders very strongly focused on their companies’ after-tax earnings, might even favor this kind of behavior. In any event, there is no systematic market-based or other nongovernmental mechanism for identifying those who are aggressive in seeking to reduce their taxes. Thus, taxpayers might rationally assess the expected reputational costs of minimal compliance as low.<sup>49</sup>

44. The tax community recognizes some Internal Revenue Code provisions and Treasury regulations as taxpayer friendly, meaning that Congress or Treasury has adopted rules that are not revenue-maximizing for public policy, administrability, or other similar reasons. *See, e.g.*, 26 U.S.C. § 1341 (2006) (describing circumstances in which taxpayers take either a deduction or a credit, depending upon which yields the lower tax liability); Treas. Reg. § 1.263(a)-4 (2008) (providing regulations for capitalization of intangible assets that include exceptions for de minimis expenditures).

45. *See, e.g.*, Lavoie, *supra* note 38, at 60 (“When the [Internal Revenue] Service interprets a tax rule in a manner that maximizes short-term tax collections . . . without consideration of the economic realities of the transaction, it does a disservice to the tax system. . . . [This] encourage[s] aggressive tax planning.”).

46. Isenbergh, *supra* note 1, at 866.

47. *See* 26 U.S.C. § 7623 (2006) (authorizing awards to whistleblowers who provide specific information leading to tax collections); Dennis J. Ventry, Jr., *Whistleblowers and Qui Tam for Tax*, 61 *TAX LAW.* 357, 362–68 (2008) (examining the IRS’s whistleblower program, which was substantially strengthened by the 2006 amendments to § 7623 of the Internal Revenue Code).

48. *See* Hanlon & Slemrod, *supra* note 26, at 127 (“[O]n average, a company’s stock price declines when there is news about its involvement in tax shelters, but the reaction is much smaller than for other accounting missteps.”); *see also* Mihir A. Desai & Dhammika Dharmapala, *Corporate Tax Avoidance and Firm Value*, 91 *REV. ECON. & STAT.* 537, 545–46 (2009).

49. *See* Hanlon & Slemrod, *supra* note 26, at 137 (“[F]or certain kinds of firms, we expect that the release of involvement in a tax shelter will cause the

Finally, political forces may react to foreclose particular tax-planning techniques once they become widely known;<sup>50</sup> still, this should not be a significant constraint against the general search for and use of such techniques.

This leads to an interesting and initially counterintuitive point. We argued above that one constraint against minimal compliance may arise where a party anticipates taking contradictory positions under different circumstances. In tax, parties also often have an interest in taking contradictory positions; this might, at first blush, push them towards more maximal compliance.<sup>51</sup> But they often engage in minimal compliance, including taking highly legalistic and technical positions that might seem inconsistent with positions they took previously in other matters. There seems to be little or no reputational sanction for this behavior in the relevant community, perhaps because the contradictory positions in question are asserted against the government rather than against other parties.<sup>52</sup> Without reputational sanction, other reasons to take more measured positions do not outweigh the perceived benefits of minimal compliance. The government sometimes reacts to minimal compliance in kind, employing its own highly technical

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stock price to increase.”). Notably, Hanlon and Slemrod deal mostly with reactions to “tax shelters,” not generic minimal compliance. Although there is no universally accepted definition of a tax shelter, the term carries an especially negative connotation. As Hanlon and Slemrod acknowledge, even while disapproving of tax shelter activity, shareholders might want their firms to pay as little tax as possible without getting caught or getting assessed penalties. *Id.* at 127; see also Joshua D. Blank, *What’s Wrong with Shaming Corporate Tax Abuse*, 62 TAX L. REV. 539, 559–60 (2009) (arguing that corporate taxpayers are less likely than individual taxpayers to suffer reputational harm from tax shelter involvement).

50. The brouhaha surrounding corporate expatriations for tax purposes represents just one example. See, e.g., Michael S. Kirsch, *The Congressional Response to Corporate Expatriations: The Tension Between Symbols and Substance in the Taxation of Multinational Corporations*, 24 VA. TAX REV. 475, 496–507 (2005) (documenting and analyzing media and congressional reactions to decisions by U.S.-based corporations to change their tax residence to tax haven countries); David R. Francis, *Tax Revenues Vanish as Firms Move from US to Bermuda*, CHRISTIAN SCI. MONITOR, May 22, 2002, <http://www.csmonitor.com/2002/0522/p01s01-uspo.html> (same).

51. See *supra* note 39 and accompanying text.

52. That being said, one can envision a norm within a reputational community that taking highly technical and legalistic positions even to parties outside the community is unacceptable. For instance, it might be seen as a signal that a party is willing and inclined to behave badly vis-à-vis members of the community. Considering when and why there would be a norm approving or disapproving technical arguments to a third party is beyond the scope of this Article.

arguments and pursuing positions in one case that arguably contradict those asserted previously.<sup>53</sup>

If most or all regulated parties under a particular regulatory regime typically try to push the envelope in the same direction, as might be the case in some areas, it may be easier for regulators to push back relatively effectively, and thereby limit the regime's historical contingency. Rather than attacking minimal compliance case-by-case, regulators may be able to promulgate regulations or otherwise craft a coordinated regulatory response to common ways that parties exploit statutory and regulatory ambiguities; different fact patterns should lead to better articulation and refinement of legal requirements. If the regulated parties are pushing in many different directions, but they are effectively constrained either by their reputational community or by limits upon how far the language can be twisted, the push and pull may be productive, or at least not problematic to the regime as a whole. The case where parties are pushing in many different directions and constraints are absent—which seems often to be the case in tax, for example—may lead to the condition we have described, where the only way to understand a regime's requirements and scope is by reference to its history.

As yet another contributing factor, tax lawyers are often considered, perhaps unfairly, as particularly keen to push the envelope in interpreting the tax laws. Jeff Gordon has described this ethos as follows:

Tax planners provide value by structuring a company's transactions so as to minimize tax, applying a formalist's approach to the constraints of the tax law against a background interpretive norm of "reasonable basis." If a close, ingenious reading of the Code and the regulations permits a reshaping of economic reality to minimize taxes, then excelsior. Whatever the ultimate social desirability of such gamesmanship, at least it serves the narrow shareholder interest of maximizing after-tax income, that is, increasing the cash in the corporate till.<sup>54</sup>

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53. See, e.g., 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 8:12 (2d ed. 1979) ("[The IRS's] basic attitude is that because consistency is impossible, an effort to be consistent is unnecessary; therefore it need not consider precedents, and it may depart from precedents without explaining why."); Steve R. Johnson, *An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Legislative Solution*, 77 TENN. L. REV. (forthcoming 2010) (manuscript at 9–12), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1471641](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1471641) (documenting the IRS's pattern of taking inconsistent positions).

54. Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L.

Gordon blames the massive Enron scandal in part on the spreading of this supposed tax lawyer ethos to accountants and other professionals.<sup>55</sup> Perhaps recent malpractice claims against tax lawyers and accountants who promoted particular shelters by clients who got caught using the shelters will persuade some tax professionals to become more conservative in advising their clients; perhaps not.<sup>56</sup>

One final constraint that operates more effectively in some fields than in others, and particularly badly in tax, is the extent to which a law utilizes terms and concepts anchored in the “real world” outside of the technical realm of the regulatory regime at issue.<sup>57</sup> Consider in this regard the rules under section 13(d) of the Securities Exchange Act of 1934, which require that a person disclose ownership of more than five percent of certain companies.<sup>58</sup> Owners often would prefer not to disclose their ownership stake. One obvious gambit is to spread the legal title among a group of people, all of whom are effectively in cahoots. The statute contemplates this possibility by establishing the concept of a group; if several people comprise a group as defined in the statute and regulations, they are treated as one “person” for reporting requirements, and reporting is required.<sup>59</sup> To avoid reporting, the principal owner will claim she and the others are not a group. The push and pull with the regulators yields increasing specificity about what constitutes a

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REV. 1233, 1238 (2002); *see also* Claire A. Hill, *Tax Lawyers Are People Too*, 26 VA. TAX REV. 1065, 1067–68 (2007) (describing a continuum of tax lawyer behavior, where one end is the “(Almost?) Over the Edge Envelope Pushing” tax lawyer who has a perhaps extreme form of the tax lawyer ethos Jeffrey Gordon describes).

55. Gordon, *supra* note 54, at 1238.

56. *See* Jay A. Soled, *Tax Shelter Malpractice Cases and Their Implications for Tax Compliance*, 58 AM. U. L. REV. 267, 295–96, 306–07 (2008).

57. *See* discussion *infra* Part II.B (considering statutory and regulatory use of ordinary and technical terms).

58. *See* 15 U.S.C. § 78m(d)(1) (2006); SEC Rule 13d-1, 17 C.F.R. § 240.13d-1 (2009).

59. *See* 15 U.S.C. § 78m(d)(3) (providing, in connection with information reporting that, “[w]hen two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a ‘person’ for the purposes of this subsection”); 17 C.F.R. § 240.13d-5(b)(1) (elaborating: “When two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer, the group formed thereby shall be deemed to have acquired beneficial ownership, for purposes of sections 13(d) and (g) of the Act, as of the date of such agreement, of all equity securities of that issuer beneficially owned by any such persons.”).

group, but the outcome does not stray too far from what intuition suggests. After all, the group concept, while technical, is importantly anchored to something in the real world.

Still, we must be careful not to make too much of this point. Even assuming that the concept of what is anchored in the real world can be made precise, we can readily find examples of terms ostensibly anchored in the real world that seem to have escaped their moorings. Like the securities laws, the tax laws also have provisions using the concept of group, and for similar reasons. Numerous tax provisions may be easily circumvented by related parties acting at the behest of one another. For example, a corporation with property that has declined in value might want to recognize a loss for tax purposes but cannot do so until it sells the property, which it still wants to use. The corporation might be inclined to “sell” the property to its owner or to a subsidiary, thus triggering the loss,<sup>60</sup> absent attribution rules precluding loss recognition in related-party sales.<sup>61</sup> To prevent such evasion, the tax code expressly requires affiliated groups of corporations, defined annually by reference to stock ownership, to file a single tax return aggregating their income and deductions.<sup>62</sup> However anchored in the real world the basic concept of an affiliated group may be, that anchoring has not prevented the tax concept from straying far from its moorings. The parameters of the affiliated group definition have been the subject of much litigation as taxpayers have manipulated stock terms and ownership structures to either achieve or avoid affiliated group status;<sup>63</sup> the courts have resorted to an extra-statutory business purpose requirement<sup>64</sup>

60. See 26 U.S.C. § 165(a) (2006) (allowing a deduction for losses realized).

61. See *id.* § 267(a)(1), (b)(2)–(3) (disallowing deductibility of losses from related-party sales and defining relevant related-party relationships).

62. See *id.* § 1502 (requiring consolidated returns for affiliated groups); *id.* § 1504 (defining affiliated group by reference to stock ownership); see also S. REP. NO. 617, at 9 (1918) (“[A] law which contains no requirement for consolidation puts an almost irresistible premium on a segregation or a separate incorporation of activities which would normally be carried as branches of one concern. Increasing evidence has come to light demonstrating that the possibilities of evading taxation in these and allied ways are becoming familiar to the taxpayers of the country.”).

63. See, e.g., I.R.S. Priv. Ltr. Rul. 9714002 (Dec. 6, 1996) (“There are situations in which taxpayers try to achieve affiliation status, and there are situations in which taxpayers try to avoid affiliation status.”).

64. See LAWRENCE M. AXELROD & MARK A. KOZIK, CONSOLIDATED TAX RETURNS § 4:10 (4th ed. Supp. 2008) (discussing judicial reliance on the business purpose doctrine to counter manipulation of the affiliated group definition).



and Congress has provided Treasury and the IRS with broad discretion simply to disregard ownership changes they find abusive.<sup>65</sup> Even if these reactions have limited “abuses,” they have not helped the tax laws avoid being strongly contingent on their trajectory; the parameters of the affiliated group definition, as with many other important concepts in tax, are hard to explain and justify coherently.

## II. THOUGHTS ON REGULATORY REGIMES

As we have observed, regulatory laws tend to differ from other types of law in the complexity of both their subject matter and the programs they establish.<sup>66</sup> We have also noted that regulatory laws vary from other types of laws in their susceptibility to planning by minimal compliers.<sup>67</sup> These differences are related, as technical complexity yields greater ambiguity, which in turn creates more planning opportunities for those inclined to operate in the gray areas of the law.

Perhaps as a result of their complexity, regulatory statutes often contain certain elements that other types of laws do not. For example, regulatory statutes tend to articulate the policy goals or administrative tasks that Congress seeks to accomplish, either explicitly through special sections dedicated to that function or implicitly by express behavioral requirements using aspirational or purposive language. Also, regulatory statutes typically do not merely identify certain behaviors as off-limits. Rather, regulatory statutes usually at least outline the basic programmatic approaches that Congress believes will accomplish the identified goal or task, and these provisions typically require regulated parties affirmatively to undertake certain acts. Finally, because Congress recognizes that textual gaps and ambiguities are inevitable or even intentional,<sup>68</sup> it

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65. See 26 U.S.C. § 1504(a)(5)(F); I.R.S. Priv. Ltr. Rul. 9714002 (Dec. 6, 1996) (“The principal theme of section 1504(a)(5)(F) is anti-abuse. Generally, any guidance should operate as a one-way street to be used by the Service to deal with manipulative practices intended to either establish or break affiliation.”).

66. See discussion *supra* note 9 and accompanying text.

67. See *supra* Part I.A.

68. Several factors contribute to the inevitability of statutory ambiguity, especially in the regulatory context. When dealing with technical subjects and complicated programmatic schemes, even the most adept legislators cannot anticipate every circumstance that may fall at the margins of statutory terms and commands. Also, even if members of Congress are largely united in their assessment that a particular problem warrants a legislative solution, they may be sharply divided regarding the programmatic details for accomplishing

often grants executive branch or independent agency officials the authority to fill in programmatic details and otherwise interpret statutory requirements, perhaps with the assistance of the courts. Putting all of these elements together into a single statutory scheme is arguably a recipe for greater statutory ambiguity than is present for other types of laws.

In this Part, we describe more fully a few aspects of regulatory statutes that we regard as relevant to our theory. First, we examine more closely the ways in which regulatory statutes routinely, though not always, articulate their goals and utilize purposive language. We recognize tax law as an important exception from this pattern. We then examine how regulatory statutes and regulations employ both ordinary and technical terms in pursuit of statutory goals. Relatedly, we consider how differences in usage can give rise to interpretive challenges that may lead to the trajectory problem that we have identified.

#### A. STATUTORY PURPOSE

When legislators enact laws, they always do so to accomplish particular goals. In the context of regulatory statutes, however, legislators are often quite explicit in stating the goals they seek to accomplish. The typical regulatory statute is premised upon at least one easily identifiable core purpose: a problem to be solved, a goal to be achieved, or a task to be accomplished. The Clean Air Act aims to protect and improve air quality and, correspondingly, prevent and control air pollution.<sup>69</sup> The Occupational Safety and Health Act aspires to as-

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that goal; hence, legislators may deliberately leave statutory language ambiguous in their effort to get legislation passed in the first instance, anticipating that agencies or courts will resolve whatever issues may arise as a consequence. *See, e.g.,* ESKRIDGE, *supra* note 3, at 20 (noting with respect to the “hard cases” of statutory interpretation, “[i]f an issue is unanticipated by the majority coalition, its agents are unlikely to say anything about the issue, for obvious reasons. If the issue is controversial, the agents are likely to suppress discussion in order to preserve cohesion within the coalition. In fact, the two phenomena are often interrelated: an issue *becomes* conveniently unanticipated *because* it would be controversial to talk about it openly”); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 540 (1983) (“Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved.”); Sunstein, *supra* note 3, at 1741 (recognizing that lawmakers may reach agreement at one level of abstraction even while disagreeing at another level).

69. 42 U.S.C. § 7401(b) (2006); *Sierra Club v. Larson*, 2 F.3d 462, 464 (1st Cir. 1993) (stating that Congress enacted the Clean Air Act “to control and mitigate air pollution in the United States”).

sure “safe and healthful working conditions.”<sup>70</sup> The Securities Exchange Act of 1934 seeks, among other goals, to ensure “fair” and “honest” securities markets and a “more effective” banking system.<sup>71</sup> The Federal Power Act endeavors to further “the public interest,” promote efficiency, and conserve natural resources by regulating the transmission and sale of electricity.<sup>72</sup>

Many regulatory statutes concentrate the articulation of their purposes in a single statutory provision.<sup>73</sup> The Clean Air Act and Occupational Safety and Health Act both begin with provisions containing congressional findings and elaborate expressions of statutory purpose emphasizing, respectively, controlling air pollution<sup>74</sup> and “assur[ing] . . . safe and healthful working conditions.”<sup>75</sup> Others, like the Federal Power Act, sprinkle purposive language here and there through different statutory provisions, with phrases like “assuring an abundant supply of electric energy throughout the United States”<sup>76</sup> and “obtain[ing] economical utilization of facilities and resources in any area.”<sup>77</sup>

At least one particularly significant regulatory regime represents something of an outlier in this regard: the Internal Revenue Code (IRC). The IRC contains hundreds of provisions that are largely definitional, dedicated to identifying which

70. 29 U.S.C. § 651(b) (2006).

71. 15 U.S.C. § 78b (2006).

72. 16 U.S.C. §§ 824–824a (2006).

73. See, e.g., Securities Exchange Act of 1934, 15 U.S.C. § 78b; Occupational Safety and Health Act, 29 U.S.C. § 651; Clean Air Act, 42 U.S.C. § 7401.

74. The Clean Air Act (CAA) clearly identifies “air pollution” as its target, not least by repeating that phrase multiple times in its opening findings and declaration of purpose. See 42 U.S.C. § 7401(a)–(b); see also *id.* § 7470 (articulating separately the purposes of part of the CAA dedicated to prevention of significant deterioration of air quality, which purposes in turn emphasize “air pollution,” “air quality,” and “clean air resources”). The CAA’s declaration of purpose specifies also three programmatic elements for controlling air pollution: “a national research and development program,” “technical and financial assistance to State and local governments,” and “the development and operation of regional air pollution prevention and control programs.” *Id.* § 7401(b)(2)–(4).

75. OSHA’s declaration of purpose specifies as its objective “to assure . . . safe and healthful working conditions” for “every working man and woman” and “to preserve our human resources,” both in general and in identifying thirteen separate avenues for achieving that objective. 29 U.S.C. § 651(b).

76. 16 U.S.C. § 824a (providing for the regulation of electricity generation, transmission, and sale via regional districts).

77. *Id.* § 824a-1 (authorizing exemptions from state laws, rules, and regulations based on certain findings).

transactions contribute either positively or negatively to net income for the purpose of computing one's annual tax liability.<sup>78</sup> The IRC contains no statement of policy or declaration of purpose, however, and in fact is remarkably devoid of purposive language. One might try to infer that revenue-raising must be the purpose behind the IRC. Yet many if not most provisions serve other social or economic functions that are in tension with the goal of raising revenue; for example, the IRC grants individual taxpayers deductions for home mortgage interest<sup>79</sup> and charitable contributions,<sup>80</sup> and permits businesses to deduct the cost of health insurance for their employees<sup>81</sup> while not requiring employees to recognize the benefit as income.<sup>82</sup> Congress has allowed deductions for various business expenses but denied or limited those deductions where it either disapproves of some aspect of the expenditure or prefers not to forego so much revenue.<sup>83</sup> Hence, Reuven Avi-Yonah has ascribed three different purposes or goals to the IRC: raising revenue, facilitating redistribution, and regulating private activity.<sup>84</sup> None of these purposes are stated; all are merely implied.

In other words, each individual provision or sub-provision of the IRC may possess its own particular theoretical or political justification, but the federal income tax laws collectively lack coherence and always have.<sup>85</sup> At a deep level, the IRC

78. For example, 26 U.S.C. § 61 (2006) defines income broadly. After that, Subtitle A, Chapter 1, Subchapter B, Part II of the Internal Revenue Code contains twenty separate provisions addressing items specifically included in gross income, and Subtitle A, Chapter 1, Subchapter B, Part III of the Internal Revenue Code contains forty-one separate provisions addressing items specifically excluded from gross income for federal income tax purposes. Subtitle A, Chapter 1, Subchapter B, Part VI of the Internal Revenue Code then offers another forty separate provisions providing itemized deductions for individual and corporate taxpayers. These are only a small number of the many, many tax provisions that contribute to determining taxable income.

79. See 26 U.S.C. § 163.

80. See *id.* § 170.

81. See *id.* § 162; Treas. Reg. § 1.162-10(a) (2006).

82. See 26 U.S.C. § 106.

83. See, e.g., 26 U.S.C. § 162(a)(2) (allowing a deduction for travel expenses, but only if they are not "lavish or extravagant under the circumstances"); *id.* § 162(m) (disallowing a deduction for wages in excess of one million dollars paid to certain corporate executives).

84. See Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 3 (2006).

85. For example, former General Counsel to the Treasury and tax expert Randolph Paul observed in 1938 that "[i]n 25 years of development federal taxation has had little direction on the legal side. There has been no chart or compass. Growth has been *ex necessitate*. . . . There is pressing need today for

lacks a principled account of who should or should not be paying taxes, and why or why not. Many will submit that everyone ought to pay their fair share, but few agree on precisely what share is fair. Moreover, many will maintain, with little principled analysis, that their own burdens are unfair. Inertia more than consensus drives what little agreement exists as to the goals of the IRC. The extent to which other regulatory regimes may reflect similar problems remains to be seen.<sup>86</sup>

Of course, we recognize that the concept of statutory purpose is a difficult one, impossible to define rigorously or precisely. Critiques of judicial reliance on statutory purpose in interpreting statutes are legion, not least because the abstract nature of purposive language makes it hard to apply consistently or objectively to resolve more detailed and concrete programmatic ambiguities.<sup>87</sup> Also, some will say that all law reflects compromises to appease interest groups, rendering the notion of broad statutory purpose relatively meaningless.<sup>88</sup> Nevertheless, at a minimum, purpose serves as an important rhetorical device: law simply must be articulable as furthering some sort of public purpose rather than merely appeasing particular in-

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more careful thinking in terms of our federal tax system as a unit.” Jasper L. Cummings, Jr. & Alan J.J. Swirski, *Interview: Randolph Paul*, A.B.A. SEC. OF TAX’N NEWS Q., Winter 2009, at 4, 5 (quoting RANDOLPH E. PAUL, *SELECTED STUDIES IN FEDERAL TAXATION*, SECOND SERIES v–vi (1938)).

86. Various commenters with whom we have discussed this project have suggested campaign finance, certain aspects of patent law, and antitrust as potential candidates for comparison on this score. As noted, we hope to consider some or all of these regulatory regimes in future work.

87. Depending upon one’s perspective, this may be a feature rather than a bug.

88. See, e.g., ESKRIDGE, *supra* note 3, at 26–27; Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 46 (1984); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 427 (1989); see also LEO KATZ, *ILL GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* 13–14 (1996). Not everyone accepts the indeterminacy of statutory purposes. Consider the following argument:

Whether words be the skin of the idea, in the simile of Mr. Justice Holmes, or chameleons which take their color from their surroundings, in the figure occasionally used by Continental jurists, the skin, we must remember, is already half filled; the chameleon’s natural gray shines through the red or green which it has assumed from its surroundings. Although we are convinced that hanging a murderer has no deterrent effect whatever, or has even a slight stimulating effect, we can scarcely recast the obvious immediate purpose of a statute which makes murder capital.

Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 878–79 (1930).

terest groups.<sup>89</sup> Correspondingly, whatever the limitations of purposivist analysis in statutory interpretation, there is little doubt that government attorneys, regulated parties, and reviewing courts routinely rely on purpose in structuring arguments concerning the proper meaning of statutes and regulations.<sup>90</sup>

## B. ORDINARY AND TECHNICAL TERMS

All law uses terms from ordinary language and more technical terms. Regulatory regimes are no different. When a regime uses a term from ordinary language, that term's ordinary meaning may serve as an important determinant of a term's meaning in law. Yet the law may attempt for its own purposes to craft a meaning that differs, perhaps significantly, from ordinary understanding. The law also frequently uses technical terms, some that it borrows from other fields like business or science, and others that it creates from whole cloth. Ordinary and technical terms are by no means mutually exclusive; an otherwise ordinary term may become a technical term when either a statutory definition or common law interpretation over time deviates from ordinary usage. Also, a term may be largely technical, yet its meaning may be informed by some ordinary usage, and vice versa.<sup>91</sup>

Consider, for example, the word "employee," which is frequently used in the regulatory context. Nonlawyers would have little difficulty defining employee. Dictionaries all offer common

89. See Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677, 708–09 (1996) (discussing purpose as "a useful fiction"); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79–85 (2006) (recognizing the importance of statutory purpose in establishing context for textual analysis).

90. See, e.g., *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 127 S. Ct. 1534, 1541–43 (2007) (disregarding a literal reading of statutory text in light of legislative history and statutory purpose); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute . . .").

91. There is voluminous writing on the law's use of ordinary versus technical terms. See, e.g., BRIAN BIX, *LAW, LANGUAGE AND LEGAL DETERMINACY* 178–93 (1993) (discussing the role of language in the law); Mary Jane Morrison, *Excursions Into the Nature of Legal Language*, 37 CLEV. ST. L. REV. 271, 287–90 (1989) (discussing particularly the distinction between technical and ordinary understandings of terms used by lawyers); Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1123–24 (2008) (recognizing that ordinary terms may hold special meanings in the legal context).

definitions.<sup>92</sup> People know an employee when they see one, or at least think they do. “Employee” also enjoys a long history of definition at common law, for example in assessing an alleged employer’s contract or tort liability for the actions of its purported employee.<sup>93</sup> Irrespective of either ordinary usage or common law, many regulatory statutes that impose requirements either on employees or on their employers define the term for their own purposes to delineate a different group of persons. Thus, for example, federal government employees and postal workers are not employees under the Fair Labor Standards Act<sup>94</sup> or the Occupational Safety and Health Act<sup>95</sup> but they are explicitly so under the tax laws.<sup>96</sup> Carve-outs like these may be entirely defensible on policy grounds, and they may not cause interpretive issues, but they do represent a first step in creating disconnects between ordinary perceptions and legal definitions, a point to which we shall return. Beyond targeted carve-outs or inclusions, and more problematic for purposes of interpreting regulatory requirements, many of the statutory definitions of “employee” are decidedly circular. For example, different statutes have defined employee as “any employee,”<sup>97</sup> or “any individual employed by an employer,”<sup>98</sup> or “an officer, employee, or elected official.”<sup>99</sup> In the absence of further guidance, the courts often turn to the common law to assess who is an employee.<sup>100</sup> Yet, regulators administering different

92. See, e.g., MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 408 (11th ed. 2003).

93. See, e.g., WILLIAM A. KLEIN ET AL., BUSINESS ASSOCIATIONS: AGENCY, PARTNERSHIPS AND CORPORATIONS 42–48 (7th ed. 2009) (presenting cases discussing whether a person was an employee or an independent contractor for purposes of determining liability of a third party who would be the “employer”).

94. 29 U.S.C. § 203(e)(2)(A)–(B) (2006).

95. *Id.* § 652(5)–(6).

96. 26 U.S.C. § 3401(c) (2006). The tax code further defines “employee” differently for purposes of other types of withholding, explicitly including life insurance salesmen and home workers for Federal Insurance Contributions Act (FICA) withholding purposes, see *id.* § 3121(d)(3)(B)–(C), but specifically excluding them for Federal Unemployment Tax Act (FUTA) withholding purposes, see *id.* § 3306(i).

97. 29 U.S.C. § 152(3) (defining “employee” for the purposes of the National Labor Relations Act (NLRA)).

98. *Id.* § 1002(6) (defining “employee” for the purposes of ERISA).

99. 26 U.S.C. § 3401(c) (defining “employee” for the purposes of federal income tax withholding).

100. See, e.g., *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (finding ERISA’s definition of employee to be “completely circular” and therefore turning to the common law to define the term); *Cnty. for Creative Non-*

regimes have adopted separate rules and regulations under each for assessing who is an employee as opposed to a manager or an independent contractor with variable results,<sup>101</sup> and judicial applications of even the common law standard may vary from regime to regime.<sup>102</sup> Thus, as one prominent study observed:

The NLRA, the Civil Rights Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act—each major labor and employment statute—has its own definition of employee and its own way of drawing the line between employees and independent contractors. Many of these definitions appear to be quite similar. But they were created over a period of a half century, and their language is often vague or circular, leaving them open to a broad range of interpretations. As a result, the line has been drawn differently in the different statutes, depending on the inclinations of the agency at the time or Supreme Court doing the drawing. These differences in interpretation mean that a worker might be deemed an employee for purposes of the FLSA but an independent contractor for purposes of the NLRA, without any apparent policy justification for the disparity of treatment. The Commission finds no principled justification for this regulatory morass.<sup>103</sup>

“Mine” and “miner” are other ordinary terms, commonly associated with land, mineral extraction, and those who work in that context. Yet, the Black Lung Benefits Act only covers those who work in coal mines,<sup>104</sup> while the Federal Mines Safety and Health Act (FMSHA) definition includes other types of mines but also equipment, tools, and surrounding surface

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*Violence v. Reid*, 490 U.S. 730, 739 (1989) (referencing common law principles in the absence of a statutory definition to interpret “employee” for purposes of the Copyright Act of 1976). *But see* *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 93–94 (1995) (suggesting that giving “considerable deference” to an administering agency’s definition of “employee” might be more appropriate than relying upon common law).

101. *See, e.g.*, Rev. Rul. 87-41, 1987-1 C.B. 296, 298–301 (purporting to apply common law standards for identifying employees for FICA and FUTA withholding tax purposes but listing twenty particular factors for consideration in making that assessment).

102. *See Darden*, 503 U.S. at 326 (recognizing that the FLSA’s definition of “employee” may be broader than the common law definition); *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 496 (D.C. Cir. 2009) (applying a ten-factor common law agency test to evaluate whether a worker is an employee for the purposes of the NLRA); *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008) (employing a five-factor test to determine whether a worker qualifies as an employee for the purposes of the FLSA).

103. U.S. COMM’N ON THE FUTURE OF WORKER-MGMT. RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS—FINAL REPORT 64 (1994).

104. *See* 30 U.S.C. § 902(d) (2006).



structures and environs.<sup>105</sup> Again, these different definitions may be based on meaningful policy justifications; silver miners presumably do not suffer from Black Lung Disease, while at least some tools, equipment, and surface structures associated with mining activities are obviously relevant to assuring worker safety. Nevertheless, over time these definitions have generated some unusual disputes over coverage, with arguably confusing results. Circuit courts have reached different conclusions regarding whether machine repairmen for mining companies who work in shops distant from any actual mining site are coal miners eligible for benefits.<sup>106</sup> Whether or not a lay person would think a truck or a road is a mine, both trucks used in mining and roads leading to a mine would seem arguably to fall within the FMSHA's broad definition, but the Secretary of Labor has interpreted the statutory definition to include private roads leading to mines but not the trucks that drive on them.<sup>107</sup>

While the ordinary meanings of employee, mine, miner, and other like terms no doubt influence regulated parties, agencies, and courts as they seek to interpret those terms, it is hardly surprising that the same word, even one with an ordinary meaning, may mean different things depending upon the context. Yet, the fact that some statutes define these terms differently, in ways that diverge significantly from ordinary meaning, represents an important cognitive disconnect between legal and lay understandings,<sup>108</sup> one that may presage difficulties of the type we discuss. Regulated parties are most likely to perceive the law as legitimate when acts or conditions that seem to be similar in all salient respects yield the same legal consequences, and will be more skeptical of laws whose seemingly ordinary terms encompass an odd assemblage of dissimilar items that do not so obviously warrant the same treatment.

105. *See id.* § 802(g)–(h).

106. *Compare* *Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Consolidation Coal Co.*, 884 F.2d 926, 935 (6th Cir. 1989) (repairmen eligible for benefits), *with* *Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Ziegler Coal Co.*, 853 F.2d 529, 537 (7th Cir. 1988) (repairmen not eligible for benefits).

107. *See* *Sec'y of Labor v. Nat'l Cement Co. of Cal.*, 573 F.3d 788, 794–96 (D.C. Cir. 2009) (recognizing the Secretary of Labor's interpretation of 30 U.S.C. § 802(h)(1)(B) to cover roads but not vehicles as reasonable).

108. *See, e.g., E. Inv. Corp. v. United States*, 49 F.3d 651, 653–55 (10th Cir. 1995) (assessing the applicability of the different tax definitions of “employee” to a group of sales representatives); *see also* *United States v. MacKenzie*, 777 F.2d 811, 814 (2d Cir. 1985) (“[I]n drawing the line between who is an employee and who is an independent contractor there will be some doubtful cases . . .”).

Other statutory terms derive from the specialized vernacular of a particular industry that is being regulated, or perhaps the legal profession itself. If a statute targets a particular industry, it stands to reason that terms that industry participants commonly employ will find their way into statutory provisions, and that industry understandings will inform their meanings. Consider, for example, the term “security,” which the Securities Act of 1933 defines by a list of examples including but by no means limited to notes, stocks, bonds, debentures, and many others.<sup>109</sup> Bankers and securities lawyers will readily interpret security according to the understandings of their industry. Alternative lay meanings referring to safety and protection from harm are not likely to be confused with the statutory definition. Rather, the question is whether statutory usage deviates from industry conceptions—an inquiry that in many cases should have a determinate answer.

Finally, regulatory law is littered with terms that are artificial creatures of the statutes they inhabit, useful as shorthand to capture more complicated concepts, but largely detached from any real world conception. It is difficult to imagine anyone using statutorily defined terms like “technological system of continuous emission reduction,”<sup>110</sup> or “semi-critical reprocessed single-use device”<sup>111</sup> outside their statutory contexts. As Joseph Isenbergh once famously observed about a particular

109. See 15 U.S.C. § 77b(a)(1) (2006) (“The term ‘security’ means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a ‘security’, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.”).

110. 42 U.S.C. § 7411(7) (2006) (defining “technological system of continuous emission reduction” for the purpose of establishing standards of performance for new stationary sources of air pollutants under the Clean Air Act).

111. 21 U.S.C. § 321(l)(mm)(2) (2006) (building on definitions of other terms to define “semi-critical reprocessed single-use device” as a “device that is intended for one use, or on a single patient during a single procedure . . . that has previously been used on a patient and has been subjected to additional processing and manufacturing for the purpose of an additional single use on a patient” and “that is intended to contact intact mucous membranes and not penetrate normally sterile areas of the body”).

tax term of art, “there is no natural law of reverse triangular mergers.”<sup>112</sup> Interpreting such terms is not complicated by ordinary understandings regarding their meaning. Nevertheless, as we discuss further below, their utter lack of ordinary meaning and consequent detachment from any other nonstatutory, real-world anchor may leave them quite susceptible to distortion and incoherence.

At some level, all laws are merely collections of words with potentially variable meanings. In some instances, however, the meanings of statutory terms—whether ordinary, specialized, or artificial—are a matter of very broad if not complete consensus; deviations from that consensus are limited and readily comprehensible given statutory goals and context. Legal outcomes concerning particular applications of such terms may be readily associated with statutory purpose and text; a regime’s history may offer further explanation and support for particular conclusions without being an integral part of an explanation of what the regime does and how. By contrast, some regimes contain many terms the meanings of which are established and maintained either by fiat or through some elaborate trajectory of interpretation and application that deviates substantially from whatever consensus understanding statutory terms may have once enjoyed. For such regimes, it is difficult, if not impossible, to understand some of its important legal outcomes except by reference to history, broadly construed. At either end of this continuum of meaning, the push and pull between regulatory parties and regulators that we described in Part I.B reflects disagreements over the meanings of words used by regulatory statutes and regulations. The considerations we dis-

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112. Isenbergh, *supra* note 1, at 879. Isenbergh notes in particular, in discussing the well-known tax case of *Gregory v. Helvering*, 293 U.S. 465 (1935):

At the outset, *Gregory* raises the question whether the notion of a “reorganization” in the 1928 Act is simply a creature of the statute or whether it imports something from life—life in this case being the world of business in which “reorganizations” occur. Within the terms of the statute, the taxpayer had a winning case because she had done everything the statute required. If, however, we view the statute not as an exhaustive definition of reorganizations but as incorporating something from the world of business, the government had a strong case. Certainly, what happened in *Gregory* did not much look like the sort of adjustment of a business that the notion of a “reorganization” would bring to mind if derived from the business world and not solely from the statute.

*Id.* at 867–68. Isenbergh additionally observes that the statute “purported to define reorganizations,” as contrasted “with the Revenue Act of 1921, which purported only to enumerate certain transactions *included* within the term ‘reorganization.’” *Id.* at 868.

cussed in that Part are important determinants of where any particular regulatory regime will lie on such a continuum.

### III. THOUGHTS ON CATEGORIES IN LANGUAGE AND LAW

Regimes that can only be explained by reference to their history and trajectory will lack coherence and consistency. Such regimes frequently allow parties to comply in ways that violate the spirit of at least some of what the regime is trying to achieve. Moreover, they sometimes treat differently things that are hard to distinguish in any principled way. Regimes that rely less on their history to convey their requirements and scope do this far less often. In Part I, we discussed the forces that might make a regime's trajectory more or less strongly historically contingent. In this Part, seeking further insight into what historically contingent regimes look like, we explore a different conception of the language of regulatory regimes.

Law operates by specifying what people (or entities) must, may, or may not do. The specification is made using a category. Psychologists Markman and Ross define categories as "groups of distinct abstract or concrete items that the cognitive system treats as equivalent for some purpose."<sup>113</sup> In legal categories, "law" substitutes for cognitive systems. Legal categories assign consequences for category membership; they also specify criteria for membership. A statute that prohibits *X* must specify how we can tell whether something is an *X*. A law providing that securities fraud is punishable by *X* years in prison and \$*Y* fine must tell us how to determine what actions fall into the category of securities fraud. A law requiring federal government approval for the marketing and sale of drug delivery devices must tell us how to assess the terms "drug" and "device."<sup>114</sup> A law that imposes a tax on taxable income must tell

113. Arthur B. Markman & Brian H. Ross, *Category Use and Category Learning*, 129 PSYCHOL. BULL. 592, 592–93 (2003). The psychology and philosophy literatures develop theories about categories at considerable length; while the theories differ among themselves and articulate and develop many nuances, most of those differences and nuances are not relevant to our account. See generally LAWRENCE W. BARSALOU, COGNITIVE PSYCHOLOGY: AN OVERVIEW FOR COGNITIVE SCIENTISTS 15–51 (1992); CONCEPTS (Eric Margolis & Stephen Laurence eds., 1999), DOUGLAS L. MEDIN, BRIAN H. ROSS & ARTHUR B. MARKMAN, COGNITIVE PSYCHOLOGY 317–50 (2005); see also GREGORY L. MURPHY, THE BIG BOOK OF CONCEPTS (2002).

114. See Federal Food, Drug, and Cosmetics Act, 21 U.S.C. §§ 321(g)–(h), 393(b)–(d)(2) (empowering the FDA to ensure that drugs and devices are "safe and effective" and defining "drug" and "device"); see also, e.g., *FDA v. Brown &*

us how to determine what combination of financial inputs and outflows constitutes taxable income.<sup>115</sup>

The “classical view” was that categories were rule-based and, more specifically, that categories had necessary and sufficient conditions.<sup>116</sup> It is fair to say, though, that most models of categorization have rejected a strong classical view for most types of categories.<sup>117</sup> A more generally used model involves prototypes. The category has one or more typical (or perhaps ideal) prototypes at its core. Candidates for inclusion in the category are assessed by how much they resemble the prototypes, where resemblance is determined by reference to *salient* similarities.<sup>118</sup> Some psychologists have also discussed another type of category, a goal-derived category, one “defined solely in terms of how [its] members fulfill some desired goal or plan.”<sup>119</sup>

Most laws and regulations define category membership either by explicit lists of features or through prototypes that convey the necessary elements for membership. Laws also utilize categories organized around goals. In this Part, we construct a taxonomy of legal categories consisting of three types: those with necessary and sufficient conditions, those with prototypes, and goal-derived categories.

Categories with necessary and sufficient conditions are, in principle, rule-like, with the same frailties well acknowledged

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Williamson Tobacco Corp., 529 U.S. 120 (2000) (reviewing FDA determinations that nicotine is a drug and cigarettes and smokeless tobacco are drug delivery devices under the FDCA).

115. See 26 U.S.C. §§ 1(a)–(d), 11(a) (2006) (imposing tax on “taxable income” of individuals and corporations); *id.* § 63(a) (defining “taxable income” by reference to other defined terms and provisions within Title 26, Chapter 1, Subchapter A of the U.S. Code). As observed, much of the Internal Revenue Code is dedicated to defining taxable income. See *supra* note 78 and accompanying text.

116. BARSALOU, *supra* note 113, at 29 (“According to the classical view of categories in philosophy and linguistics, rules underlie categorization. Although rules can take a variety of forms, the ideal rule specifies properties that are individually necessary and jointly sufficient for category membership.”).

117. See *id.* at 30.

118. See, e.g., *id.* at 28; MURPHY, *supra* note 113, at 28; Arthur B. Markman & Dedre Gentner, *Thinking*, 52 ANN. REV. PSYCHOL. 223, 235–41 (2001). The philosophy literature also has a great deal to say about this issue. See, e.g., Hilary Putnam, *The Meaning of “Meaning,”* in READINGS IN LANGUAGE AND MIND 157 (Heimir Geirsson & Michael Losonsky eds., 1996).

119. MURPHY, *supra* note 113, at 62; see also Lawrence W. Barsalou, *Deriving Categories To Achieve Goals*, in 27 THE PSYCHOLOGY OF LEARNING AND MOTIVATION: ADVANCES IN RESEARCH AND THEORY 1, 1 (Gordon H. Bower ed., 1991) (originating the term “goal-derived categories”).

in the literature comparing rules and standards.<sup>120</sup> These categories may provide a roadmap for what many would regard as spirit-violative conduct—conduct that honors the literal terms of a law but violates what the law is trying to achieve. Our account of laws that are specified using necessary and sufficient conditions is not new, except insofar as we assert that some regulatory regimes may present more opportunities for spirit-violative conduct than others, a point to which we will return in Part IV.

Prototype-centered categories are far more critical to our account. The prototype is supposed to generate the category; the category members should be relevantly similar to the prototype. Critically, in regulatory regimes that cannot be well-explained except by reference to their history and trajectory, the process by which the prototype generates the category does not assure any kind of principled relevant similarity, and efficacy and legitimacy suffer. This is especially the case where the regulatory category is centered around a term with an ordinary meaning.

Goal-centered categories begin as standards. They may become more rule-like as they are interpreted and applied,<sup>121</sup> but they will typically remain mostly standard-like. These categories are supposed to provide ex post flexibility and discretion, helping law limit the spirit-violative behavior that more rule-like categories often permit. In our account of regimes with more historically contingent trajectories, the goal-centered categories fail to fulfill this task.

#### A. CATEGORIES SPECIFIED BY NECESSARY AND SUFFICIENT CONDITIONS

In both common parlance and law, many categories might seem to be specified by necessary and sufficient conditions. A category would have particular conditions for membership; a candidate for membership would be a member if and only if it

120. See generally Kaplow, *supra* note 10; see also Lawrence A. Cunningham, *A Prescription to Retire the Rhetoric of "Principles-Based Systems" in Corporate Law, Securities Regulation, and Accounting*, 60 VAND. L. REV. 1411, 1417–35 (2007). We note too, that many categories seemingly specified by necessary and sufficient conditions are in fact subject to override to treat nonmembers as members, and to treat members as nonmembers.

121. See Kaplow, *supra* note 10, at 577–79 (observing that standards become more rule-like over time); see also Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 964–65 (1995) (recognizing that rules and standards are not entirely distinguishable).

met the conditions. But very few categories have such conditions. Quick introspection suggests why this is so, but writing on the point is voluminous.<sup>122</sup> Imagine trying to define necessary and sufficient conditions for everyday words such as “water” or “diamond” or “car.”<sup>123</sup> Consider likewise in this regard what counts as a “deadly weapon” for purposes of attaching legal consequences. One quickly runs up against cases that are hard, not because a complicated inquiry is needed to yield a definitive resolution of the issue, but because none is forthcoming.

In law, the best examples of categories with necessary and sufficient conditions seem to be laws that confer a status or treatment on parties who follow a particular roadmap: creating a legal easement, establishing a limited liability company, effectuating a merger, or engaging in a transaction that the tax laws will treat as a like-kind exchange. Even these may not be completely binary cases.<sup>124</sup> In fact, categories purely defined by necessary and sufficient conditions are rare. One important reason is that, while necessary and sufficient condition categories achieve predictability, they are also susceptible to manipulation. When the law provides a roadmap to achieve a particular legal consequence, people may be able to follow the roadmap to achieve results that are rather different from what the law intended and that perhaps violate the law’s spirit while honoring the letter. Tax provides many examples, such as provisions that allow taxpayers to defer recognizing gain from corporate reorganization transactions, which the tax laws define by

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122. See, e.g., STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (2001); see also BARSALOU, *supra* note 113, at 29–30; Putnam, *supra* note 118.

123. We shall shortly turn to a discussion of the famous “vehicle” example. See *infra* notes 146–49 and accompanying text.

124. Sometimes the law will specify conditions that are necessary but may not be sufficient. For example, if young children accomplished all of the steps necessary to establish a limited liability company, the law still may not recognize the company’s creation under the general rules governing capacity to contract. See MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 74 (5th ed. 2006). In other instances, a judge or other decision-maker may interpret a category expansively so that the conditions that specify the category are not even necessary: *X* does not meet the conditions of membership in the category but is nevertheless treated as though it were a member because *X* is saliently similar to what is in the category. See *infra* note 126 and accompanying text (discussing the example of de facto merger doctrine). In rigorous parlance, there will rarely if ever be a pure case of necessary and sufficient conditions, or for that matter a pure case of conditions that are either necessary or sufficient. When we use the terms, we mean necessary and/or sufficient, or nearly so.

roadmap but which the IRS and the courts also require to satisfy certain doctrines aimed at preserving the spirit of the law, like having a business purpose.<sup>125</sup> The doctrine of de facto merger, adopted by some states, represents another such case.<sup>126</sup>

The closer legal categories are to having necessary and sufficient conditions, the more the classic concern about legal formalism arises—that someone can do what the law formally requires to obtain a particular desired result where a more con-

125. *See, e.g.*, 26 U.S.C. § 368 (2006) (defining “reorganization”); *see also* BORIS I. BITTKER & JAMES S. EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS* ¶ 12.03 (6th ed. 1999) (“It remains true, therefore, that literal compliance with the reorganization provisions is not enough; a transaction will be governed by the statutory provisions only if it comes within the presuppositions, as well as the language, of the provisions. The courts have driven this truth home with a variety of formulations, usually classified as the business-purpose, step-transaction, and continuity-of-interest doctrines.”).

126. To explain more fully: two business entities can combine into one in many different ways. In particular, the law recognizes and defines a merger as typically requiring a shareholder vote and may also provide for shareholders to receive the court-determined value of their shares in lieu of what the merger terms themselves indicate. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 251–258 (2001 & Supp. 2008); MODEL BUS. CORP. ACT §§ 11.01(a), 11.02(a), 11.04(b) (2005); WILLIAM A. KLEIN & JOHN C. COFFEE, JR., *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 215–18 (10th ed. 2007) (discussing the appraisal remedy historically and in various jurisdictions). Parties often do structure their combinations as mergers and follow the associated statutory requirements, but sometimes parties combine their businesses in other ways, deliberately aiming to fall outside the statute. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 271, 275 (2001 & Supp. 2008) (recognizing and imposing procedural requirements upon asset sales and corporate dissolutions as transactions distinct from mergers); JEFFREY D. BAUMAN ET AL., *CORPORATIONS LAW AND POLICY* 433–36 (6th ed. 2006) (acknowledging different business combination structures). In some jurisdictions, only companies that combine expressly using the merger statute are subject to its provisions; in those jurisdictions, statutes impose necessary and sufficient conditions for inclusion in the merger category. *See, e.g.*, *Hariton v. Arco Elecs. Inc.*, 188 A.2d 123, 125 (Del. 1963). In other jurisdictions, however, courts have applied the merger statute to, for instance, require a shareholder vote or allow shareholders to have their shares valued by a court even though the combination was achieved in some way other than by following the merger statute. *See, e.g.*, *Rath v. Rath Packing Co.*, 136 N.W.2d 410, 418 (Iowa 1965); *Farris v. Glen Alden Corp.*, 143 A.2d 25, 30–31 (Pa. 1958). In other words, those courts recognize transactions that do not follow the steps required to effectuate a merger under the applicable merger statute as de facto mergers that trigger rights available when a statutory merger occurs. It is noteworthy that Delaware and many other states reject the doctrine of de facto merger, valuing predictability over arguments about equity. *See generally* WILLIAM A. KLEIN ET AL., *BUSINESS ASSOCIATIONS* 713–15 (6th ed. 2006) (describing origins of the de facto merger doctrine); Wendy B. Davis, *De Facto Merger, Federal Common Law, and Erie: Constitutional Issues in Successor Liability*, 2008 COLUM. BUS. L. REV. 529, 539–40 (describing the de facto merger doctrine).



textual or intent-based approach might deny that very result. The need for some predictability in the law may make this inevitable to some extent. Importantly for our purposes, different regimes may offer more, or more important, opportunities for regulated parties to behave in spirit-violative ways. If there is sufficient opportunity to behave in spirit-violative ways, the regime's efficacy and legitimacy may be undermined. But, as noted above, legal categories are often, and probably typically, not specified by necessary and sufficient conditions. Many more are specified by reference to prototypes, a subject to which we now turn.

## B. PROTOTYPE-CENTERED CATEGORIES

In lieu of necessary and sufficient conditions, categories are often defined through one or more full or partial prototypes.<sup>127</sup> A prototype captures what a category most obviously includes: it is an easy case, sometimes a typical case, and sometimes an ideal case.<sup>128</sup> For example, the category of bachelor readily admits somebody who is unmarried but available to be married in some meaningful sense. George Clooney is a prototypical "bachelor."<sup>129</sup>

Alternatively, prototype-centered categories may be specified through some number of features in a list. Diagnostic categories in medicine and psychiatry provide a familiar example.

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127. See BARSALOU, *supra* note 113, at 25–31. See generally Arthur B. Markman & C. Hunt Stilwell, *Role-Governed Categories*, 13 J. EXPERIMENTAL & THEORETICAL ARTIFICIAL INTELLIGENCE 329, 330 (2001). A related term, "exemplar," is sometimes used in the literature. While prototype and exemplar are not completely synonymous, for purposes of this Article they can safely be treated as such; accordingly, we refer only to prototypes and mean by our use of this term to include exemplars as well.

128. In a sense, a category that is defined by necessary and sufficient conditions represents a special case of a category defined by prototype. In other words, a prototype could encompass all the conditions that are necessary and sufficient for membership in the category. Most, however, do not. Importantly, the psychology literature distinguishes prototype-centered categories from those defined by necessary and sufficient conditions. See BARSALOU, *supra* note 113, at 28–29. We find it worthwhile to distinguish the two category types in this Article to help summon the intuition that there will always be penumbral cases and to provide an intuitive sense of how we might resolve such cases.

129. See, e.g., Elisabeth Eaves, #3 Los Angeles, FORBES.COM, Mar. 1, 2007, [http://www.forbes.com/lists/2007/3/forbeslife-cx\\_singles07\\_Los-Angeles\\_2503.html](http://www.forbes.com/lists/2007/3/forbeslife-cx_singles07_Los-Angeles_2503.html) (stating that George Clooney is the "most eligible bachelor" in Los Angeles); *Top 100: America's Most Wanted*, PEOPLE, July 10, 2000, at 60, 62 (naming George Clooney the most eligible bachelor in 2000); see also WINTER, *supra* note 122, at 85–92.

A doctor may diagnose someone as having a particular disease if she presents at least four of eight common symptoms. It may prove typical for a subset of patients to exhibit four particular symptoms off the list of eight; that cluster of four symptoms also represents a prototype.<sup>130</sup>

Indeed, intuition tells us that in ordinary language, most words, terms, and concepts are actually prototype-centered categories. For most words, terms, and concepts, we quickly recognize some clear examples. We can also readily imagine cases that are murkier. The Pope and a thirteen-year-old boy, while meeting the formal definition of bachelor, are certainly not prototypical.<sup>131</sup> The obvious instances represent the category's core, while the more questionable ones are at the category's penumbra.

Given the reliance of ordinary language on prototypes, it is not surprising that legal categories often center on prototypes as well.<sup>132</sup> Murder—that is, a killing warranting punishment—provides an example. At common law and within many criminal statutes, the category of murder includes intent-to-kill murder, depraved-heart murder, and felony murder,<sup>133</sup> but not killing in the heat of passion<sup>134</sup> or justifiable homicide.<sup>135</sup> Each

130. See BARSALOU, *supra* note 113, at 34.

131. “Bachelor” as a category centered around a prototype is a standard example in the literature, as is the observation that the Pope is not a prototypical bachelor. See, e.g., WINTER, *supra* note 122, at 85–89. Winter’s discussion develops far more nuance than is relevant for our account on use of the term prototype. See also BARSALOU, *supra* note 113, at 30.

132. See, e.g., WINTER, *supra* note 122, at 139–65. See generally FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* 266–77 (2003) (discussing generalities and their effect on lawyers and law).

133. See WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 14.1 (2d ed. 2003) (listing types of murder recognized at common law and existing in various statutes); see also *id.* §§ 14.2, 14.4–.5 (discussing each of these types in depth).

134. See *id.* § 15.2(a) (describing “a killing while in a reasonable ‘heat of passion’” as “the most common sort of voluntary manslaughter. . . rather than murder or no crime”); see also, e.g., *Cooper v. State*, 977 So. 2d 1220, 1223 (Miss. Ct. App. 2007) (categorizing a killing in the heat of passion as manslaughter rather than murder under Mississippi law); *Rhodes v. Commonwealth*, 583 S.E.2d 773, 775 (Va. Ct. App. 2003) (recognizing a homicide in the heat of passion as voluntary manslaughter rather than murder under Virginia law (quoting *Wilkins v. Commonwealth*, 176 Va. 580, 583 (1940))).

135. See LAFAVE, *supra* note 133, § 1.6(a) (describing justifiable homicide as “no crime at all” notwithstanding intent to kill); see also, e.g., *MISS. CODE ANN.* § 97-3-15 (2006) (declaring the killing of another person justifiable, and thus legally authorized, under specified circumstances); *VT. STAT. ANN.* tit. 13, § 2305 (2009) (declaring a killing of another person under specified circumstances “guiltless”).

of these categories (or, one might say, subcategories) is its own prototype of murder.

Regulatory law relies heavily on prototype categories. The law's reach clearly encompasses what is in the core; as law evolves, penumbral cases are considered and resolved. An obvious prototype of the category of income for tax purposes is wages received from an employer.<sup>136</sup> By statute, alimony payments are also income for tax purposes,<sup>137</sup> but that was not always the case;<sup>138</sup> meanwhile, child support payments and property settlements incident to divorce are still not taxable, even though it is often difficult to distinguish them from alimony payments as a practical matter.<sup>139</sup> Similarly, bald eagles are prototypical endangered species and readily come to mind when contemplating the purposes of the Endangered Species Act (ESA).<sup>140</sup> More obscure creatures like the Illinois cave amphipod and the Delhi Sands flower-loving fly are obviously species as well under the ESA's broad definition.<sup>141</sup> Despite inclusive

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136. This is consistent with one of the most central provisions of the existing federal income tax laws, which defines "gross income" for such purposes as "income from whatever source derived" but also by a list of specific items, the first of which is "compensation for services." 26 U.S.C. § 61(a) (2006). Indeed, wages have been included among items expressly listed as income since some of the earliest income tax statutes. *See, e.g.*, Tariff Act of 1913, ch. 16, 38 Stat. 114, 167 (1913).

137. *See* 26 U.S.C. § 61(a)(8).

138. *See* *Gould v. Gould*, 245 U.S. 151, 152 (1917) (concluding that alimony was not part of "the entire net income arising or accruing from all sources" subject to income tax under the Tariff Act of 1913).

139. *See, e.g.*, Deborah A. Geier, *Simplifying and Rationalizing the Federal Income Tax Law Applicable to Transfers in Divorce*, 55 TAX LAW. 363, 364 (2002) (arguing that practical line-drawing between alimony, child support, and property settlements is impossible).

140. *See* Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 467 (1999) (describing the Endangered Species Act as designed to be "a largely symbolic effort to protect charismatic megafauna representative of our national heritage"). In fact, although bald eagles were officially listed as endangered species in 1978, the Bald Eagle Protection Act of 1940 preceded the Endangered Species Act and influenced its provisions. *See* Bald Eagle Protection Act of 1940, ch. 278, 54 Stat. 250 (1940); Determination of Certain Bald Eagle Populations as Endangered or Threatened, 43 Fed. Reg. 6230 (Feb. 14, 1978). Bald eagles have since been delisted by the Department of the Interior, though they remain protected by the provisions of the Bald Eagle Protection Act. *See* Removing the Bald Eagle in the Lower 48 States from the List of Endangered and Threatened Wildlife, 72 Fed. Reg. 37,346 (July 9, 2007); Lawrence P. Melling, *Symbolic Recovery: The Bald Eagle Soars Again*, NAT. RESOURCES & ENVT, Spring 2008, at 54.

141. *See* 16 U.S.C. § 1532(8), (14), (16) (2006) (defining "species" to include "any subspecies of fish or wildlife or plant" and defining "fish or wildlife" and

statutory definitions, however, regulators and the courts struggle to discern exactly when particular groups of animals are separate species under the ESA.<sup>142</sup> Finally, virtually everyone would recognize the male supervisor repeatedly groping and directing sexually explicit comments toward a female subordinate as a prototypical example of a hostile work environment under Title VII,<sup>143</sup> but the parameters of that category are continually evolving.<sup>144</sup>

In most cases, a new candidate may be considered a member of the category at issue notwithstanding that it does not possess all the features of the prototype(s) or does possess some features not in the prototype(s).<sup>145</sup> Much of what happens in

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“plant” in broadly inclusive terms); *see also* Final Rule to List the Illinois Cave Amphipod as Endangered, 63 Fed. Reg. 46,900 (Sept. 3, 1998); Determination of Endangered Status for the Delhi Sands Flower-Loving Fly, 58 Fed. Reg. 49,881 (Sept. 23, 1993).

142. Specifically, the ESA’s definition of species includes “distinct population segments” of species. 16 U.S.C. § 1532 (16). The ESA does not define what constitutes a distinct population segment, and there has been substantial litigation over whether this or that particular group of animals represents a distinct population segment and thus a separate species eligible for listing and protection under the ESA. *See, e.g.,* *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1145–50 (9th Cir. 2007) (reviewing an agency determination that three populations of western gray squirrels, all living in Washington State, are distinct for ESA purposes); *Nat’l Ass’n of Homebuilders v. Norton*, 340 F.3d 835, 842–52 (9th Cir. 2003) (evaluating an agency finding that pygmy-owls in Arizona are distinct from pygmy-owls in northwestern Mexico).

143. *See, e.g.,* *Billings v. Town of Grafton*, 515 F.3d 39, 48 (1st Cir. 2009) (“Of course, behavior like fondling, come-ons, and lewd remarks is often the stuff of hostile environment claims, including several previously upheld by this Court.”); *Sommatino v. United States*, 255 F.3d 704, 712 (9th Cir. 2001) (recognizing allegations of “intentional touching and . . . sexually suggestive and vulgar remarks are typical of the offensive workplace behavior giving rise to an action to remedy a hostile work environment”); Martha Chamallas, *Title VII’s Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 356–57 (2004) (recognizing claims of sexual harassment by female plaintiffs as prototypes of hostile work environment as well as constructive discharge claims); Henry L. Chambers, Jr., *A Unifying Theory of Sex Discrimination*, 34 GA. L. REV. 1591, 1610 (2000) (“The typical hostile work environment is a workplace tinged with sexual advances, explicit sex talk, sexual innuendo, gender-based hostility, or some combination of such conduct that is severe enough to affect an employee’s ability to do her job.”).

144. *See, e.g.,* Elisabeth A. Keller & Judith B. Tracy, *Hidden in Plain Sight: Achieving More Just Results in Hostile Work Environment Sexual Harassment Cases by Re-Examining Supreme Court Precedent*, 15 DUKE J. GENDER L. & POL’Y 247, 256–71 (2008) (arguing that the courts are inconsistent in applying the standards for hostile work environment sexual harassment and offering examples).

145. *See* BARSALOU, *supra* note 113, at 28–29.

courts and other adjudicative bodies, and in law school, is necessarily a discussion of penumbral cases and an attempt to figure out whether they fit into the relevant legal category. We determine which cases are in the penumbra by considering whether they are similar to the prototype(s) in salient respects.

Consider for example the oft-discussed hypothetical statute prohibiting vehicles in the park.<sup>146</sup> At first blush, we might think the category of vehicle has necessary and sufficient conditions, but it is quickly clear that the category is far from mechanical in its application. Instead, vehicle is more properly viewed as being centered around a prototype, perhaps a car. Certainly, a car is an obvious type of vehicle. But what about skateboards? What about bicycles? What about lawn mowers? What about cats carrying fleas?<sup>147</sup> Skateboards, bicycles, lawn mowers, and cats are surely not in the prohibition's core, but they might be in the penumbra.<sup>148</sup> We can at least begin to explore the penumbra and decide what is prohibited by considering the features of our prototypical vehicle, the car: large, heavy, has wheels, has a motor, transports people or things, moves fast, potentially lethal. We will often also turn to the purpose of the prohibition—reducing the number of pedestrian/vehicle accidents, perhaps—in order to narrow the set of features that are relevant.<sup>149</sup> We might then conclude at least that lawnmowers and cats should not fall within the prohibition. Meanwhile, a life-sized cardboard depiction of a car is also probably not in the penumbra, given that we are constructing the penumbra with a view towards the prohibition's intended purpose. The cardboard car might be more similar to the motorized car than either was to the lawnmower, but the similarities would not be the relevant ones.

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146. This is the famous example first discussed in H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–15 (1958). It has been cited and discussed many times since.

147. Is there an argument by which a cat might be a vehicle, if it were transporting (presumably unintentionally) fleas? This is an argument made by one of our students, in a context too convoluted to recount. The answer is probably yes, but, as the one of us who responded to our student said, for purposes of legal analysis and ordinary language, we can mostly assume such possibilities away—although perhaps not always.

148. See Schauer, *supra* note 91, at 1111 (summarizing Hart's example in these terms).

149. Of course, this glosses over the major issue of whose intent counts, and what counts as appropriate evidence of intent. See *supra* notes 87–90 and accompanying text (discussing the difficulties of identifying and applying statutory purpose).

When law uses a term from ordinary language, the scope of the legal category will not infrequently bear a close relationship to common sense understandings of the term.<sup>150</sup> If a person were to be asked to give the legal definition of vehicle for purposes of a prohibition against vehicles in the park, a likely way to proceed would be to start by referencing the prototype, then provide some other fairly common examples, and only then point out unexpected and perhaps incorrect results regarding skateboards or cats. That being said, recall our earlier discussion of the concept of “group” in securities and tax law; an ordinary language meaning of group does little to constrain the legal meaning of “affiliated group” in the tax context.<sup>151</sup>

When law uses a more technical term, ordinary language may not serve to appreciably limit the category’s scope. Consider the category of “security” for purposes of the federal securities law, a term that could be characterized as technical, although importantly reflecting a significant nonlaw meaning.<sup>152</sup> The Securities Act of 1933 offers a detailed definition,<sup>153</sup> but case law also provides that something not contained within the definition but serving particular functions can also be a security for purposes of the statutory scheme.<sup>154</sup> The category of security may not, and in fact does not, command complete consensus as to what it covers, but its coverage forms a sufficiently coherent whole.

Our concern is that, in the absence of meaningful constraints against minimal compliance pressures, a category’s coverage may become incoherent and inconsistent, and the category may operate to treat in the same way things that do not seem to bear any substance-based relationship to one another. Imagine if, in ordinary language, the term bachelor came to encompass only George Clooney and men who were of the same height and hair color. The category would be inexplicable, outside of whatever history led to that definition. Tax again offers numerous instances of this phenomenon in law, for example by defining a deduction for charitable contributions to include a donation to Harvard Law School but not one to the little neigh-

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150. See *supra* note 91 and accompanying text.

151. See *supra* notes 59–65 and accompanying text.

152. See *supra* note 109 and accompanying text (discussing security as an ordinary versus technical term).

153. See *supra* note 109.

154. See, e.g., *SEC v. W.J. Howey Co.*, 328 U.S. 293, 297–98 (1946) (concluding that securities may include items of “a more variable character” if they meet the purpose of the Act).

borhood boy with cancer and no health insurance,<sup>155</sup> or by saying that an unemployed person who lost his house to foreclosure has income from debt forgiveness while a millionaire whose sole support is interest from municipal bond investments does not have income.<sup>156</sup> If enough of a regime's important concepts become distorted in this fashion, the result may be an unprincipled and incoherent regime.

### C. GOAL-DERIVED CATEGORIES

Categories defined by necessary and sufficient conditions or by prototypes are the most common types discussed in the category literature.<sup>157</sup> As we have noted, some cognitive psy-

155. See 26 U.S.C. § 170(c) (2006) (allowing taxpayers a deduction for contributions made only to charities that fall within certain categories, including educational organizations but excluding individuals); Rev. Rul. 57-211, 1957-1 C.B. 97 (denying deduction for donation to hospital to cover the cost of care for a particular individual).

156. Compare 26 U.S.C. § 61(a)(12) (defining gross income for federal income tax purposes as including income from discharge of indebtedness), with *id.* § 103 (excluding interest earned from investments in state and local government bonds from gross income for federal income tax purposes). Section 108 does exclude income from the discharge of indebtedness from gross income under limited circumstances which include insolvent or bankrupt taxpayers; some taxpayers who lose their homes to foreclosure may fall within these exclusions. See *id.* § 108(a)(1)–(2). For at least some other taxpayers who lose their homes to foreclosure but are not insolvent or bankrupt, Congress adopted temporary relief for discharges of indebtedness occurring between December 31, 2008, and January 1, 2013. See 26 U.S.C.A. § 108(a)(1)(E) (West Supp. 2009).

157. See generally WINTER, *supra* note 122, at 169. There are also other types of categories, including Wittgenstein's conceptualization of categories like "game." See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 65–71 (1953). As the *Stanford Encyclopedia of Philosophy* notes:

[i]t is here that Wittgenstein's rejection of general explanations, and definitions based on sufficient and necessary conditions, is best pronounced. Instead of these symptoms of the philosopher's 'craving for generality,' he points to 'family resemblance' as the more suitable analogy for the means of connecting particular uses of the same word. There is no reason to look, as we have done traditionally—and dogmatically—for one, essential core in which the meaning of a word is located and which is, therefore, common to all uses of that word. We should, instead, travel with the word's uses through 'a complicated network of similarities, overlapping and criss-crossing'. . . . Family resemblance also serves to exhibit the lack of boundaries and the distance from exactness that characterize different uses of the same concept.

Anat Biletski & Anat Matar, *Ludwig Wittgenstein*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 3.4 (2009), <http://plato.stanford.edu/entries/wittgenstein/#Lan> (internal citation omitted). Categories founded on family resemblance may have their place in law, but they do not warrant separate analysis. Our contrast is, in a sense, between categories that are formed organically, reflect-

chology scholarship has identified a third type of category that is important for our purposes: the goal-derived category, which is “defined solely in terms of how [its] members fulfill some desired goal or plan.”<sup>158</sup> The legal literature has also discussed goal-derived categories, but the discussions are quite limited and relate to matters quite different than those we discuss here.<sup>159</sup>

In ordinary language terms, a goal-derived category might consist, for example, of things that will assist weight loss: a book with advice on dieting, a jump rope, a pound of celery, a collection of diverting music, and stylish clothes that will only fit after losing weight.<sup>160</sup> In law, where categories specified with necessary and sufficient conditions and prototype-centered categories will often be importantly rule-like, with comparatively detailed specification *ex ante* and comparatively little discretion for the judge or agency *ex post*, goal-derived categories will often be standard-like, with very little *ex ante* specification and considerable discretion.<sup>161</sup> Goal-derived categories in law tend to be broad prohibitions on conduct that violates some abstract goal of the law; antifraud and anti-abuse laws often fall into this category.

Rule 10b-5 under the Securities Exchange Act of 1934 provides an example. Specifically, Rule 10b-5 makes it “unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange . . . [t]o employ any device, scheme, or artifice to defraud.”<sup>162</sup> The goal was arti-

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ing some sort of internal relationship between the members versus categories that are formed by history and, to caricature, edict, pronounced to have particular members by authority of the pronouncer. The former is, again to caricature, a discovery; the latter is a creation.

158. MURPHY, *supra* note 113, at 62; *see also* Lawrence W. Barsalou, *Ad Hoc Categories*, 11 MEMORY & COGNITION 211 (1983).

159. *See, e.g.*, Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 785–86 (2001); William E. Gallegher & Ronald C. Goodstein, *Inference Versus Speculation in Trademark Infringement Litigation: Abandoning the Fiction of the Vulcan Mind Meld*, 94 TRADEMARK REP. 1229, 1256 (2004).

160. *See* BARSALOU, *supra* note 113, at 174; *see also* Barsalou, *supra* note 158.

161. Some goal-derived categories develop into categories that are *ex ante* specified to a significant degree. As a court rules on cases involving particular fact patterns, and sets forth certain principles, the category can become progressively more rule-like, as more of the typical cases are those the common law has already addressed.

162. 17 C.F.R. § 240.10b-5 (2009).



culated first. As the law has developed, it has become more rule-like, specifying *ex ante* actions that constitute fraud. But the law remains available to address actions that employ any device, scheme, or artifice to defraud in whatever form they might take.

Another significant example is the step transaction doctrine in tax. This doctrine calls for two or more related transactions to be integrated and recast as a single transaction for purposes of evaluating their tax consequences.<sup>163</sup> For example, parties might purport to have engaged in transactions *A*, *B*, and *C*, all of which qualify for tax-free treatment. The government might contend, however, that the business rationale for the three transactions demonstrates clearly that they are, in fact, merely part of a single, taxable event; the only reason to split the event into three separate steps is to avoid the taxes owed from the single-event structure. Under such circumstances, the government and the courts often decline to respect the taxpayer's characterization of its separate steps and instead treat the taxpayer as if it executed only the single, integrated transaction.<sup>164</sup>

Why might a regime have or need goal-derived categories? The categories law uses are generally specified concretely at fairly low levels of abstraction. Law is, after all, trying to guide action. Prohibiting murder is far more meaningful than prohibiting crime or even violent crime, for example.<sup>165</sup> As we have established, the concrete specification takes the form of prototype-centered categories or categories with necessary and sufficient conditions. Both types of categories open the door to spirit-violative behavior. Law therefore needs a way to reach what these lower level categories miss, to realize fully the categories' purposes. Goal-derived categories are law's solution: they represent a recourse to the higher-level abstraction that could not by itself be the law but that, as a complement to more concrete prohibitions, fills in the gaps.

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163. See, e.g., BITTKER & EUSTICE, *supra* note 125, ¶ 12.61[3] (describing the step transaction doctrine as "the judicial requirement that all integrated steps in a single transaction must be amalgamated in determining the true nature of a transaction").

164. See, e.g., Stephen S. Bowen, *The End Result Test*, 72 TAXES 722, 722-23 (1994) (recognizing and describing three different conceptualizations of the step transaction doctrine—the end result test, the mutual interdependence test, and the binding commitment test).

165. One common example given for this intuition is the following: People are more readily able to imagine a prototypical chair than a prototypical piece of furniture. See generally WINTER, *supra* note 122, at 24-25.

## IV. ASSEMBLING THE THEORY

Regulatory regimes seek to effectuate their goals through laws and regulations. Most regulated parties seek to comply. Some regulated parties seek to comply maximally, but others do so only minimally, or at least differently than regulators would like. Regulators react to minimal compliance in various ways, including through case-by-case enforcement and litigation, and by issuing regulations and rulings. We have argued that the push and pull between regulated parties and regulators on account of minimal compliance efforts importantly affects how well a regulatory regime works.

We have described this push-pull trajectory and traced how the trajectory progresses through an analysis of how law uses language. In this regard, we argue that law may usefully be depicted as consisting of three types of categories: categories with necessary and sufficient conditions, categories centered on prototypes, and goal-derived categories. These categories can work well together, to help regulated parties plan their conduct while giving regulators needed flexibility to take into account new types of situations and to limit the opportunity for spirit-violative behavior.<sup>166</sup> Or the categories can be both internally incoherent and in tension with one another.

Terms or categories with necessary and sufficient conditions may give considerable predictability. Sometimes, regulated parties who seek to comply with the regime only minimally may use these to obtain a result that may seem somewhat spirit-violative. However, for a regulatory regime with a trajectory that clearly relates to and is easily reconciled with statutory text and purpose, this does not occur often or as to core matters. Categories with prototypes may also provide predictability in many cases. The prototype-centered categories will have gray areas that are likewise susceptible to the push and pull from minimal compliance and regulator response. The law will have to confront new factual situations: What falls within the category, though admittedly in the penumbra, and what falls outside that penumbra? The resolutions will of course refer to precedent in addition to other inputs like ordinary meaning and purpose; obviously, there is significant cumulation, as each interpretation or decision provides potential authority and justification. But for less historically contingent regimes, the gray areas will be small relative to the noncontroversial portions of the category's coverage. The law's trajectory has not led to in-

166. See Kaplow, *supra* note 10.

coherence: The resemblance of penumbral cases to prototypical cases can be expressed using straightforward reasoning with comparatively little resort to history. Finally, the goal-derived categories provide a way for law to limit at least the most egregious, spirit-violative conduct that otherwise might arguably pass muster given how the other types of categories have developed. Put differently, goal-derived categories backstop the other categories, covering what they may miss or cannot feasibly address. And their coverage, too, can be explained straightforwardly with little reference to history.

Thus, ideally, the law would be richer for the push and pull between regulators and regulated parties. Statutory gaps are filled. Problematic provisions are challenged and refined. Certainly, one could reasonably expect this trajectory where the regulated parties are largely pushing in the same direction and the regulators can have a more effective, and more coherent, response. This may be the trajectory where the regulated parties are pushing in different directions but are constrained from making more formalistic arguments, again likely pushing the law's development in a satisfactory direction. Where statutory or regulatory terms derive from ordinary language, and where the evolution of the law has not strayed too far from ordinary usage, that ordinary meaning may importantly constrain regulated parties from making arguments that push a category into incoherence. The path taken—the way in which the law's coverage develops over time—can work to form a fairly coherent whole. One can readily or at least feasibly explain the law's meaning and trajectory by reference to statutory purposes.

Consider, by contrast, a regime whose trajectory is strongly historically contingent in the manner we have described. In a regime that needs extensive reference to its trajectory to explain its coverage, the push and pull between regulators and minimal compliers will be quite distant from the ideal, reflecting inconsistencies on both sides. Whatever necessary and sufficient condition categories are present allow for considerable spirit-violative behavior. Perhaps more importantly, the scope of the prototype-centered categories becomes attenuated and more difficult to explain organically; the core is quite small, and the resemblance between the core and the cases the category comes to encompass can best or only be explained by referencing the history. Finally, the coverage of the goal-centered categories also becomes rather hard to explain except, again, by reference to history. Indeed, the goal-derived categories, rather

than complementing the other categories, may themselves either yield a contradictory set of results or results that are inconsistent with those of the first two types of categories. In particular, a category defined by necessary and sufficient conditions, or a prototype-centered category with some sufficient conditions, might permit outcomes that the goal-derived category would seem to preclude. In sum, the categories may become internally incoherent and may conflict with one another. Statutory meaning will become distorted. It will become very hard to justify or explain the law by reference to its purpose. Any explanation will require reference to the twists and turns of the path—the push and the pull.

### CONCLUSION

As yet, the ideas and conclusions that we present in this Article are quite preliminary. Much work remains to be done to evaluate our account by reference to particular regulatory regimes. Tax may or may not prove to be an exceptional case, different in kind from other areas of law. Nevertheless, we believe that our theory reflects a certain intuitive logic and offers a coherent and plausible explanation for why some regulatory regimes have greater difficulties with efficacy and legitimacy than others.